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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No.  179

UNITED STATES OF AMERICA,  
*Plaintiff and Appellant,*

v.

SOUTHERN PACIFIC COMPANY, et al.,  
*Defendants and Appellees.*

## BRIEF FOR APPELLEES.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 585

UNITED STATES OF AMERICA,  
*Plaintiff and Appellant,*

v.

SOUTHERN PACIFIC COMPANY, et al.,  
*Defendants and Appellees.*

## BRIEF FOR APPELLEES.

### Statement of Case.

#### a. Nature of Suit.

This is a suit brought by the United States, on December 10, 1910, against the Southern Pacific Railroad Company (and others claiming under the railroad company) to cancel a patent issued to this railroad company on December 12, 1904. This patent was issued under the authority of the Congressional grant of July 27, 1866 (14 Stat. 292) and conveyed 6109.17 acres of what are defined as indemnity lands in this grant, that is, lands situated in odd numbered sections more than twenty and less than thirty miles from the line of the railroad. These lands are situated in Township 30 South, Range 23 East, Mount Diablo Meridian, in Kern County, Cali-

fornia. They lie in a low range of hills, called the Elk Hills, near the southern margin of the great central valley of California, the southern part of this great valley being known as the San Joaquin Valley.

The charge in the bill of complaint is that the railroad company knew that these lands in the Elk Hills contained valuable deposits of oil when it filed its selection list in November, 1903, and when it obtained its patent on December 12, 1904, and that it concealed this knowledge from the government. The answer of the railroad company denies this charge and alleges in addition that the lands in suit were not only not known or believed to be valuable for oil at the time they were patented, but are, even now not known to contain oil. Voluminous testimony was taken before a commissioner of the court. No evidence was taken before the trial court itself. A decree was given by the District Court in favor of the government as to all the lands sued for. This decree was reversed by the Circuit Court of Appeals on the ground that the evidence was insufficient to establish the government charge (249 Fed. 794). The case is before this Court on appeal by the government from this decision of the Circuit Court of Appeals.

**b. Situation of lands sued for.**

The southern end of the great basin of the San Joaquin Valley, in which the lands in suit are situated, is formed by the junction of the Sierra Nevada Mountains on the east and the Coast Range Mountains which swing around from the west, that portion of the Coast Range which borders the south end of the San Joaquin

Valley being given the local name of "Temblor Range". This range has an elevation of from three to four thousand feet above the level of the San Joaquin Valley.

The Elk Hills cover an area about six miles broad and fifteen miles long, the lands in suit being near the middle of this area. The position of these hills and of the lands in suit with reference to the surrounding region is shown on Map No. 1 in the Appendix to this brief. At the western end of these hills, near the town of McKittrick, they are about four miles out from the Temblor Range. Toward the east they diverge from the line of the valley border until at their eastern end near Buena Vista Lake they are fully fifteen miles out in the valley. Another low range of hills, known as the Buena Vista Hills, lies between this eastern end of the Elk Hills and the Temblor Range, about four miles from the latter.

**c. Brief outline of history of oil development in this region.**

At the time these lands were selected and patented no discovery of oil had been made within their limits or nearer to them than four miles (R. 1729). It is also conceded that up to this moment no oil has been found in any of the ten sections in suit. In 1911 and 1912 a small amount was found in three even sections near the east border of the lands in suit, but this was not in commercial quantities and was obtained at a depth beyond practical drilling as carried on in 1904 (R. 1984-8, 3122-6).

In 1899, as the result of the sensational discovery of oil in the "Kern River field" near the town of Bakers-

field, about thirty miles east of the lands in suit, and also at McKittrick, a few miles west of the lands in suit, an "oil boom" developed in this region during which speculative "locations" for oil were made over a wide extent of territory along the border of the southern end of the San Joaquin Valley. No wells were drilled by these locators and their "claims" were allowed to lapse (R. 501-2). It is conceded that none of these men ever discovered a drop of oil in the lands in suit or in their immediate vicinity.

These locators were not practical oil men, and the character of their operations is well indicated by one of them, W. G. Sylvester, who testified for the government (R. 358-60). He was a dentist and knew nothing about oil, but joined in the rush. Although bound for another locality, he located in the Elk Hills because they "were probably as good as the rest". He had no idea that a discovery was necessary and says that his plan "was to cover as much territory with proper notices and monuments as possible".

This "oil boom" of 1899 also led to the filing of many forest lieu and other agricultural selections in the same region. Protest was at once made by oil locators against these selections. On February 21st and 28th, 1900, following the receipt of these protests, the Commissioner of the General Land Office sent telegrams to the local land officers withdrawing nearly fifty townships from "disposition". These townships were situated along the south and west border of the San Joaquin Valley and included the township in which the lands in suit lie (Exhibit QQQ, R. 1524).



It has been claimed by counsel for the government that this withdrawal suspended even mineral entries and that for this reason those who had made "locations" in the Elk Hills did not proceed to actually drill for oil. This, however, was not the fact. In a letter from the Commissioner to the local land officers dated July 19, 1900, it was stated that "these suspensions do not include mineral lands" (U. S. Geological Survey Bulletin No. 623 "Petroleum Withdrawals and Restorations" page 79), and in a later letter of the Commissioner, dated October 23, 1903, directing a special agent to examine the lands now in suit in connection with the railroad selections, it was again stated that these lands had been "suspended from disposition under the agricultural land laws on account of their alleged mineral (oil) character by telegrams 'P' of February 21 and 28, 1900" (R. 1542).

The same withdrawal included all the lands in the McKittrick, Midway and Sunset Districts, west and south of the lands in suit, in which there was extensive drilling for oil under mining locations from 1899 on, as already related. This development went on in spite of the withdrawal, which indicates that it was generally understood by oil men that their operations were not subject to the withdrawal. The inapplicability of this withdrawal to mineral locations was further evidenced in July, 1900, by a decision of the United States Circuit Court in the district where these lands lie in a bitterly fought contest between the "scrippers" and the "oil locators" (*Olive Land and Development Co. v. Olmstead*, 103 Fed. 568, 578).

The withdrawal of the lands in suit from disposition under the agricultural land laws persisted until February 11, 1904, when they were relieved from suspension. This was due to the report of the special agent of the General Land Office above referred to, E. C. Ryan, who reported to the Commissioner that he had made a careful examination of these particular lands and had found nothing "of any kind that would tend in my opinion to warrant said lands being classed as mineral in character".

His conclusions coincided in this respect with those of the practical oil men of the region. The fact is, as clearly appears from the exhibits introduced on each side (Plaintiff's exhibits Ha to Hd; Defendant's exhibit 13, which is a copy of the California State Mining Bureau Report for 1904) and from the evidence of witnesses to which reference will later be made, that until several years subsequent to the date of the patent now in suit the attention of practical oil men was confined entirely to scattered portions of a narrow strip of land many miles from the Elk Hills and along the base of the Temblor Range, where the sedimentary beds carrying the oil emerged from beneath the floor of the valley and had been uplifted by the elevation of the Temblor Range in past geologic ages.

Subsequent to the patent now in question this development crept slowly out farther into the valley until in 1908, 1909 and 1910 the wonderfully rich Midway field was developed from six to ten miles south of the lands in suit. At McKittrick, however, which is the region

nearest the lands in suit, it was found that the productive oil area did not extend out towards the valley but was confined to very narrow limits (R. 1728, 1842, Exhibit 116).

By 1910 the wells had progressed from the base of the Temblor Range as far as the Buena Vista Hills, which lie between the Elk Hills and the Temblor Range, and here in February, 1910, a well encountered a large flow of gas and oil (R. 1994). The man who drilled this well testified that on the day following this discovery he looked across the valley to the northwest and saw many drilling outfits being hastily moved over into the Elk Hills to begin work there, the discovery in the Buena Vista Hills having encouraged oil men to seek for oil even as far away as the Elk Hills (R. 1994).

The drilling done by the men who entered the Elk Hills as a result of the discovery of oil in the Buena Vista Hills was the first that was done in the township now in suit and in its immediate vicinity. The evidence shows that from 1910 to 1912 these men drilled thirty-six wells (See Exhibits O and 16) in these hills, some to a depth of over four thousand feet (one near five thousand feet), at a total cost of approximately two million dollars.\* Only three of these wells found oil at all and these three were closed down after producing 9941 barrels of oil at a cost of \$517,613.94 (R. 3122-6).

This suit was started during the height of the drilling excitement in the Elk Hills in 1910.

\* The locations and depths of these wells are shown on Exhibit 16 reproduced as Map No. 6 in Appendix to this brief.

**d. Selection and patent of lands in suit.**

As already stated, the lands in suit lie in Township 30 South, Range 23 East, Mount Diablo Meridian, and are indemnity lands. They were surveyed in 1902 but the official plat of survey was not approved and filed in the local land office until May 16, 1903 (R. 3761). Thereupon for the first time these lands became subject to selection by the railroad company. C. W. Eberlein became land agent of the railroad company in August, 1903. He was immediately impressed by the fact that indemnity selections had been neglected by his predecessor and that large areas had thus been lost (R. 1154-5). He made inquiry whether any recent surveys had been made and, learning of the survey of the lands in question, he at once directed that a selection be made of these lands (R. 1157-8). His assistant, G. A. Stone, land grader for the company, was familiar with these lands from having been in that region frequently and assured Eberlein that they were non-mineral lands (R. 1028-9, Stone; 1088, 1137, Eberlein).

This selection list was filed in the local land office on November 14, 1903, accompanied by the affidavit of C. W. Eberlein stating that the lands were not "interdicted mineral lands", and that they had been examined by employees of the company and that "to the best of his knowledge and belief" none of them were mineral lands (R. 3754, 3829, 3832).

This selection was rejected by the local land office on November 17, 1903, on the ground that the lands had been suspended from entry by the general withdrawal

order of February 28, 1900, already referred to (R. 3756-7). On December 11, 1903, the railroad company filed an appeal from this rejection (R. 3863-7). In the meantime the railroad company had applied to the Commissioner of the General Land Office through its local attorney in Washington to have an examination made of these lands by some agent of the government to determine whether they were oil lands (R. 1544). E. C. Ryan, a special agent of the Land Office, was directed by the Commissioner to examine these lands and report whether they should be released from the suspension which had been made in 1900 on the supposition that they were oil lands (R. 1547). On January 22, 1904, Ryan reported to the Commissioner on this land (and on 480 acres several miles away), saying, "I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, 1904, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and I respectfully recommend that they be relieved from suspension" (R. 1550).

On February 11, 1904, the Commissioner wrote the local land officers reciting the substance of the Ryan report and directing that these lands be relieved from the oil suspension (R. 1555-6). The selection list was thereupon reinstated on February 26, 1904 (R. 3768, 3835). As part of the lands were within six miles of known mining claims, posting and publication of the selection list was ordered on March 5, 1904 (R. 3836).

The list was published in a daily newspaper of general circulation in the county where the lands are situated from April 14th to June 14th, 1904 (R. 3858-9). No contests or objections were filed (R. 3861). The Commissioner of the General Land Office asked for a change in the description of some of the base lands in this list and a rearranged list was filed on September 6, 1904, containing affidavits of C. W. Eberlein similar to those in the original application (R. 3771, 3837-51). The selected lands are the same in both lists (R. 3775). Following this, patent was duly issued on December 12, 1904 (R. 19-23).

## Argument.

### A. GENERAL OUTLINE OF GOVERNMENT CASE.

#### 1. Character of evidence offered.

As already stated, no wells have been drilled on the lands in suit and no oil has been discovered on them. When the patent was obtained in 1904, the nearest discovery of oil in commercial quantity was in Section 29 of the township to the west, four miles from the nearest land in suit and in a different geological structure (R. 1729).

This being true, no evidence was produced or could have been produced to show that it was known by anyone in 1904 that valuable deposits of oil actually existed anywhere in the Elk Hills. The evidence on both sides shows a singular unanimity of opinion to the effect that the existence of commercial deposits of oil in any tract can be determined only by means of the drill.

The government was therefore compelled to rely entirely on opinion evidence. All of this evidence falls within the following classes:

First. Evidence of men who made speculative "locations" for oil in the Elk Hills during the excitement following the Kern River discovery in 1899. These "locators" drilled no wells, discovered no oil, and, with hardly an exception, abandoned their "claims" before 1904. They testified that they made their locations because they believed the Elk Hills to be "oil land". They also testified to the existence of an "oil seepage" in the township to the east of the lands in suit as well as other "indications" of oil in these hills.

Second. Evidence of geological experts who, on the basis of recent examinations, gave their conclusion that the Elk Hills were of such structure and in such position, in regard to productive oil territory and surface indications of oil in the region about, that the agents of the railroad company *ought* to have recognized their "oil character" in 1904. As will be shown later by reference to their testimony, they did not claim that the actual existence of oil could have been determined by them except by means of wells.

Third. Hearsay evidence of supposed statements by a deceased railroad geologist and by other railroad employees indicating that they believed in 1903 and 1904 that oil *might* be found in the Elk Hills. This evidence, as will be shown later, is contradicted by the contemporaneous statements, maps and reports given by these same men to their railroad associates and others.

Fourth. Correspondence and acts of railroad agents, particularly of C. W. Eberlein, land agent of the company, claimed to indicate a belief or hope in 1904 that the lands in suit might turn out to be valuable for oil, but not showing knowledge or discovery of oil or actual belief in its existence.

All of this evidence, as well as that given in reply by the defendants, will be hereafter discussed in such detail as is necessary to show the few ultimate facts upon which the decision in this case must rest.

Stripped of all that is but surmise or suspicion of fraud, the government evidence, taken at its face value and without regard to that given in defense, would show



only that these lands were selected at a time when it was believed or, rather, *hoped* by someone that oil might be found somewhere within them. It does not show that oil was actually known to exist in a single section in the Elk Hills. It could not be determined from this testimony that a *valuable* deposit of oil existed anywhere. Whether, if it did exist somewhere, it was within the reach of the drill is not disclosed. Opinion or surmise that oil might exist, at an unknown depth, from four to ten miles from its nearest *known* occurrence is not convincing proof that the conditions in 1904 "were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end (*Diamond Coal Co. v. U. S.*, 233 U. S. 236, 239).

The "belief" here referred to must be more than mere surmise or hope or conjecture. It must be a belief practically tantamount in its effect to actual knowledge, that is, a belief based on facts so complete as to exclude rational doubt. Even actual knowledge (or such a fully warranted belief) on the part of the railroad agents would not justify the relief here asked by the government if it went merely to the existence of *some* oil *some-where* within the area sued for. This knowledge (or belief) must be shown to have also comprehended every element of location, quantity and quality which would have given this oil commercial availability and value under conditions then existing. Without such knowledge there could be no fraud, that is, there could be no consciousness that the government was being deprived of land which it ought to retain.

We shall show that the entire case of the government is based on a theory which leaves out of consideration all questions of extent, position, availability or value of oil within the disputed areas. On the contrary it frankly attempts to obtain a decree on the ground that every acre in suit has that nebulous thing termed an "oil value", that is, a speculative value, because the surroundings are claimed to promise that perchance oil will be found *somewhere* in the Elk Hills.

**2. The government relies on proof of mere belief or speculation as to possible mineral character and not on proof of knowledge of actual mineral character.**

**a. Reasons which caused government to adopt its theory.**

The election of the government to try this case on the theory just stated was compelled by the facts. Oil, unlike coal which stays where it was formed, is a fugitive substance, subject to so many unseen underground influences and movements that it has become a truism among oil men that the drill alone can determine its existence and amount (R. 485). At the time this suit was started much had been written about the California oil fields by government geologists, particularly by Mr. Ralph Arnold, a distinguished oil geologist connected with the United States Geological Survey. His conclusion concerning the prediction of oil in undrilled territory was thus stated by him in a bulletin published in 1907: "Anyone at all familiar with the conditions of occurrence of petroleum in the California fields knows that any but the most tentative predictions as to the location of oil are extremely hazardous" (R. 926). In another government bulletin by the same

author published in 1910 (Exhibit 10), in which he discusses the very region now in question, he said (p. 16) that "for furnishing definite information regarding the occurrence of the oil in any particular area there is just one instrument that may be relied upon, and that is the drill."

In addition to this conceded uncertainty concerning the occurrence of oil in untried territory, the government was confronted with the further difficulty that the lands in suit lie in a geological structure which in 1904 had not been tested at any point. It is generally understood among oil men in California that anticlinal structures in sedimentary formations offer the best promise for the accumulation of oil. This is due to the fact that oil, being lighter than water, is usually driven by the latter into those formations which are highest. Whether or not this has actually occurred in any anticline, such as that formed by the elevation of the Elk Hills, for instance, depends on whether there was any oil so situated that it could be drawn into the anticline, whether there is a porous sand or other formation to serve as a reservoir, and on many other facts which must await the test of the drill (R. 675).

Occasionally some of the great initial uncertainties as to a portion of an anticline or dome may be removed by the drilling of wells on another part of the same structure. In the present instance, however, this had not been done in 1904. The nearest existing wells (R. 1729) were on the McKittrick anticline to the west, from four to ten miles from the lands in suit and separated from them by a deep synclinal depression

(R. 2180). The productive area on the McKittrick anticline is very narrow and wells drilled on the side toward the Elk Hills have encountered water instead of oil (R. 2184-5). The development to the southeast of McKittrick in 1904 was along the base of the Temblor Range and still farther removed from the Elk Hills' structure (Exhibit 10, U. S. G. S. Bulletin 406, Plate 1).

It thus appears that the government at the outset of this suit was placed in a position making it manifestly impossible to obtain proof that the lands in suit were actually known to anyone to contain valuable deposits of oil. The only alternatives presented were to dismiss the suit or to attempt to sustain it by the proof of a speculative value of these Elk Hills lands as an oil *prospect*. This latter alternative was chosen regardless of the direct and specific charges in the bill of complaint that the defendants actually *knew* at the time of the patent that all of these lands contained *valuable deposits of oil*.

**b. Evidence of unskilled witnesses.**

The witnesses called by the government to prove the "oil character" of these lands consisted of two classes. The first were men of little or no practical or theoretical training in the search for oil. Most of these had made speculative locations in the Elk Hills during the oil boom of 1899. A few of these men were drillers, one or two had had some experience as producers of oil, but most of them were teamsters or farmers or followers of occupations not connected with the oil industry. The second group of witnesses were men

either of extensive experience in the oil business or of special skill as geologists.

We have inserted in the margin\* a summary of the testimony of the first class of witnesses mentioned, giving literally or in substance their conclusions concerning the character of the region in suit. Nearly all of the witnesses based their conclusions on a supposed "gas blowout" or "oil seepage" on Section 32 of Township 30-24, just to the east of the township in which the lands in suit are situated. As will be shown hereafter (post p. 93), this supposed oil or gas seepage is merely a recent surface organic deposit having no relation to oil.

It is to be noted that these witnesses did not pretend to say that there is a valuable deposit of oil at any place in the lands in suit. In general their conclusions

\* "I regarded the Elk Hills at that time as oil territory."—S. P. Drouillard (R. 117). "Thought it was good for oil \* \* \* but deep."—L. G. Sarnow (R. 135). "Had a very high opinion of that land as oil territory."—F. D. Lowe (R. 151-2). "The formation was there to show that it was oil producing territory."—I. M. Anderson (R. 156). "I think it is good as oil territory."—M. S. Wagy (R. 180). "Thought the Elk Hills was 'a prospect \* \* \* that would warrant taking a chance on.'"—J. I. Wagy (R. 261). "It was the general belief \* \* \* that the Elk Hills were oil territory."—W. E. Ott (R. 277). "I regarded the Elk Hills \* \* \* as oil lands."—I. N. Chapman (R. 315). Owen (railroad geologist, now dead) regarded the Elk Hills as "oil territory" in 1904.—S. P. Wible (R. 321). Owen told me "before 1904" that the Elk Hills were "good oil territory" but "would be very deep."—Charles Brisco (R. 337). In 1904 Owen said "he thought there was oil there but that it was very deep and it wouldn't pay to go after it."—C. F. Haberkern (R. 350). "I believed that the indications in the Elk Hills were good. The prospects were, and that is all you ever 'wild-cat' on—your belief or expectations. \* \* \* This was then an unknown field."—H. A. Blodget (R. 367, 395). "I thought the Elk Hills were 'favorable for oil property.'"—H. P. Dover (R. 462). "I regarded that as possible prospective oil territory \* \* \* It was more of a gamble that it would be at those places closer to the crop-pings."—C. F. Whittier (R. 475, 477). "I thought there was a good probability of the lands in 30-23 \* \* \* proving to be oil lands."—M. T. Hubbard (R. 491). "I was satisfied that there was a fair chance of getting oil there. \* \* \* At that time it had no value as actual oil territory. \* \* \* We were advised by experts that in all probability it was an oil country."—N. C. Farnum (R. 497, 510, 516). "I certainly regarded the Elk Hills at that time as good oil territory."—C. W. Lamont (R. 581).

apply to the entire range of the Elk Hills, including more than fifty sections. They defined this broad region as "oil territory" or "oil lands". These expressions are obviously vague and inexact. They may mean lands actually valuable because they contain a great deal of oil or merely lands which contain *some* oil. A careful analysis of all this testimony shows, moreover, that actual oil in the ground—whether in large or in small quantities—did not especially enter into the formation of their conclusions. To most of them the expression "oil land" meant only that the entire region had a speculative value, not for oil, but for *prospecting* in the *search* for oil. Nearly every one of these witnesses had made "locations" in these hills during the oil excitement of 1899 and 1900 and had held them for a time in the hope that some stranger would take them off their hands. The fact that they each and all abandoned these locations soon after they were made indicated to the Circuit Court of Appeals "that if there was faith at all in 1903-4, it was faith without works" (249 Fed. 785, 804).

**c. Evidence of government expert witnesses.**

The essentially fictitious character of the government's contention as to the "oil value" of those lands is made even more apparent by the testimony of its witnesses who claimed special skill either as practical oil men or as geologists. They were few in number and their evidence in this regard may be briefly summarized.

W. E. Youle, who had had nearly fifty years experience in the production of oil and who had been one of

those who located claims in the Elk Hills in 1899, but who never actually attempted to produce oil on any of these claims although actively engaged in drilling only a few miles away, said that "intuitively" these hills "looked good" to him (R. 553). Further, he said, "a geologist will say of all of those hills toward the Elk Hills and that whole country, 'there is good oil territory' but as to the depth, I don't see how they can tell. They endeavor to tell but the drill is the proof of it" (R. 564). \* \* \* "Water streaks go through any formation. That is why the oil business is a gamble. It is because there is no man, geologist, expert or anything else, who can tell you where these faults are. There may be a world of oil there; there may be a tight streak of sand filled up with clay that won't let the oil through, and you might drill right into that spot. You cannot look down and see; you may be in the wrong place" (R. 566). \* \* \* "The oil business is a gamble. It is not like farming. You just bet that you don't go down that deep and that territory was good to have bet on. If you win once in four or five times, you make a lot of money. That is the reason I would have advised people to spend \$50,000 or \$100,000 there. I wouldn't advise widows and orphans and dishwashers and cooks who could not risk money; but if you wanted a chance to make a million dollars, I would pick the Elk Hills quicker than any piece of land in there, because the formation justifies what I say" (R. 577). \* \* \* "The fact that oil is found in one section is not evidence that it may be found in every section in the township. There may be kidneys. Oil is not contained like a river underground, but in

kidneys. While you are in the oil sand all the time, we know by experience that there are dry holes drilled in oil sand" (R. 578).

This witness summed up his conclusions as to the *value* of these hills thus, "From my observation and examination in those hills, I would not have advised that they be sold for their agricultural value \* \* \*. I most assuredly would have advised my employer to acquire the lands at a price in excess of their agricultural value because of their oil possibilities" (R. 576). He did not attempt to say that oil actually existed in any particular place. This, he frankly conceded, could be determined only by the drill. Nor would he attempt to predict that the possible oil plane was within the reach of the drill. And, finally, the only *value* he was able to place on these lands was a conjectural value "in excess of their agricultural value" because of their oil "*possibilities*" and not their oil realities. His strong impression as to the uncertainty of the prediction of the actual existence of oil is shown by his statement at another place that "there is nothing there until you drill a well" (R. 567).

The only other practical oil operator of long experience called by the government as a witness was Frank Barrett. He testified that he made an expert examination of a portion of the Elk Hills in 1899. This was during the general oil excitement when locations were being made nearly everywhere in the vicinity of the oil fields (R. 517). He claimed that he then made a favorable report to the man who employed him to make this examination, although the evidence discloses that the



employer did not attempt to drill in the Elk Hills but directed his attention elsewhere (R. 479, Barrett; 505, Farnum). But Barrett did not pretend to say that he considered any part of the Elk Hills as *actual* oil land. "I could not have said, 'This is known oil territory' ", he testified, "I could only have said, in my opinion it would prove to be such. \* \* \* The oil doesn't always appear where they say it will. The true expert is the drill. You couldn't say that a territory is known oil ground till you put a drill in it" (R. 485). Again he said, "I have observed promising indications very frequently that didn't pan out. The oil business is a good deal like elections" (R. 485). In reference to location of oil by means of geological science, he said, "I have known numerous instances where scientific men have pointed out where wells should be sunk and those wells have been sunk and nothing produced. That is not at all uncommon" (R. 486).

Three geological experts were put on the stand by the government. The first of these was F. O. Martin, a "mineral inspector" of the General Land Office, who had had no practical experience in the oil business. He first saw the region in question in 1910 but attempted to state the conclusions he would have reached had he seen them in 1904 (R. 610, 614). He testified that in the light of the "geological structure of the region" and the existing development in 1904, "I would have advised any company employing me to hold these lands in the Elk Hills for their mineral value. \* \* \* I certainly would have advised my employer, who was not the owner of the land in 1904, to acquire it at a

price in excess of their value for agricultural purposes" (R. 614). \* \* \* "I would not say that I could always, or even fifty per cent of the time, predict where oil would be found in paying quantities. \* \* \* I would not predict that oil could be found in paying quantities unless under the most favorable circumstances" (R. 620).

All that this witness said was that he now believes that in 1904 he would have thought the Elk Hills as a whole were worth acquiring as a *prospect*. On being pressed on cross-examination to say what conclusion he would have reached as to their commercial value he said, "I would not be able to state that it would be found in paying quantities. I would be able to state that it would be found there, that oil would exist below the Elk Hills. \* \* \* I would advise him to bore. That is the only way he would be able to find out" (R. 665).

It is to be noted that this witness goes to the extent of saying that he would have been positive that there was *some* oil in the Elk Hills. It appears elsewhere that he based this conclusion on the supposed oil seepage in the township to the east of the lands in suit (R. 613). As already stated, we shall (p. 93, post) show that this was not an oil seepage.

The most distinguished expert witness produced by the government was Dr. J. C. Branner, professor of geology at Stanford University. He did not visit the Elk Hills until 1912 at which time he spent part of one day there (R. 1014-15). In 1900 he made an examination of some supposed oil land several miles to the west

of the Elk Hills (R. 1002), and in 1910 he made an examination of the Buena Vista Hills, just south of the Elk Hills (R. 1014, 1989).

Dr. Branner's testimony is important because of his manifest attempt to state the situation fairly from a scientific standpoint. He frankly admitted that his opinion was influenced by developments since 1904, which would include the three wells in the Elk Hills which have found some oil (R. 1003). "My opinion was that the Elk Hills was the most promising area for petroleum in that region," he said. "I formed the opinion that it was oil bearing. That opinion was confirmed to a considerable extent by the developments that had taken place there recently, but everything seemed to fit together; that is, the geological structure, the development of the wells, the occurrences of the oil seepages,\* and everything, pointed to the Elk Hills as a promising field for the finding of petroleum."

This was the opinion he formed in 1912. But he then attempted to give the conclusion he would have drawn in 1900, saying, "Had I gone into the Elk Hills in 1900, I would have arrived at the same opinion as to the character of these lands that I did on the later trip; decidedly so. The lands *were favorable for the accumulation of oil* and I should say that they *were oil in character*" (R. 1004).

At no point in the direct examination of this witness was his attention directed to the real question in issue

\* As in the case of other government witnesses Dr. Branner took the organic deposit in Section 32 of Township 30-24 to be an oil seepage and considered it important as an indication of oil. He made no test to determine its real character (R. 1015).

—the value of these lands in suit for actual oil production. All he was asked to say and all he did say on direct examination concerning value was that he would not have advised the sale of these lands in 1904 for their “agricultural value” alone (R. 1005), which is the same test of mineral value propounded to all the other government witnesses by counsel for the plaintiff, and is in fact the test now relied upon by the government on this appeal.

But on cross-examination he was asked what conclusion he could reach as to the *real* character of these lands and his replies should be conclusive against the contention that these lands were known to be valuable for oil in 1904. “In passing upon the character of the Elk Hills”, he said, “I did not determine in any way the quantity of oil and made no attempt to do so. I could not have done so from the examination I made. *That could only be determined by putting down wells.* One well might determine the matter and it might not. Development is required to determine whether or not that is a valuable oil deposit. A geologist does not determine the economic value of the land for oil. All he undertakes to do is to say whether or not the land has prospective value. I mean by prospective value, that the company proposing to develop that region should take it up—buy it if necessary—and put down a well on it, should prospect it” (R. 1007).

In explanation of the expression he had used, “suitable for the accumulation of oil”, he said, “But that would not necessarily mean that they had accumulated oil. That could be determined only by exploration”

(R. 1016). Further he said, "I do not think there is any way to determine from an examination of the surface how large an area yields oil at any point. It sometimes happens that the sand beds become hardened so that they cease to be media through which oil can pass, and it occasionally or even frequently happens that the sand beds pinch out between hard layers of strata" (R. 1018).

On his attention being called to the important fact that the lands might be without value for oil because of the great depth of the possible oil horizon, he said, "I have not made sufficient examination with that question in mind, to be able to tell whether you could ascertain the depth without a well in the Elk Hills. I made no attempt to do so. The purpose of my examination was to ascertain generally whether that could be considered possible oil territory and *I made no attempt to determine whether it was paying oil territory*" (R. 1020). (Italics ours.) As he was employed by counsel for the government to make this examination, the answer just quoted clearly confirms what we have said as to the government theory of the case.

Finally, on redirect examination, Dr. Branner thus summed up his conclusions:

"I should say, decidedly, that the conditions in the Elk Hills are such as to warrant the ordinarily prudent man in the investment and expenditure of money with a reasonable expectation of developing a paying oil property. But I should like to explain this, that if we went back to the conditions as they existed there before any wells were put down in either of those hills, and if I had been the consulting geologist for some company or party who anti-

cipated putting down wells there, I should have put it to him in this way: 'In my opinion the geology, altogether, of the mountains to the west, and the floor of the valley, and everything taken together, strongly suggest that these hills are the best place in which to put down oil wells. There ought to be, so far as we can see, enormous quantities of petroleum under those two groups of hills. Now there is nothing absolutely certain about putting down an oil well in a new region. There is a certain amount of risk about it and you can't get away from the risk. And I should have said to those men: 'If you have money to risk and you can afford to lose it, put it in there; if you can't afford to take any risks, you had better let somebody else do it.'

"I mean that anyone who had money to risk and who might afford to lose it might get larger returns for his money than he would from an ordinary investment. Perhaps I ought to say that one of the reasons for that risk lies in the fact that there is no way, short of putting down a well there, to determine the thickness of the strata that overlie the oil-bearing bed. As everyone knows, who knows anything about petroleum wells, you may have an enormous volume of petroleum so deep that you can't get it, and I should have said that there may be the possibility there. \* \* \* I do not mean to be understood as saying that I actually determined that that territory did contain an immense quantity of oil. I meant to say that if I had gone over that ground in 1900 with a view to saying whether or not those were probably petroleum lands, I should have, under those circumstances, pronounced them oil lands and recommended their exploitation to anyone who was able to take the risk. I realized that the risk might result in a total loss of the investment" (R. 1025-8).

The closely guarded statements of the witness concerning the "oil character" of the lands in suit do not indicate a belief on his part that the "known conditions"

in 1904 "plainly" pointed to the existence of oil deposits in any section in suit, to use the language of this Court in a recent case, "of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end" (*Diamond Coal Co. v. U. S.*, 233 U. S. 236, 239). Borrowing further from the language of the same case (p. 249), there is nothing in his testimony "pointing persuasively" to the "quality, extent or value" of the supposed oil. He does not even say that it exists at all in any of these lands. The most he says is that the Elk Hills *as a whole*, are "suitable for the accumulation of oil", but he refused to say that oil had actually accumulated anywhere.

His conclusions concerning the futility of predicting economic deposits of oil are in accord with the statement of the geologist Ralph Arnold already quoted (ante p. 14). This is natural as Arnold was a student under Dr. Branner (R. 1021).

Further light on the mental attitude of Dr. Branner toward attempts to predict the occurrence of oil deposits from surface indications is given by a report made by him in 1910 on the Buena Vista Hills (just south of the Elk Hills) at a time when oil had just been discovered on the margin of these hills (R. 1014). In this report he said, "If oil had not been found, however, in the region south and west of the Buena Vista Hills, a geologist would have been very bold indeed who would have ventured to predict the existence of petroleum in the Buena Vista Hills themselves" (R. 1992). If this was

his conclusion in 1910 concerning a range of hills far more favorably situated than are the Elk Hills and at a time when development and knowledge was far beyond that of 1904, it is evident that he would have regarded such a prediction concerning the Elk Hills in 1904 as more than merely "bold".

The remaining expert witness called by the government was A. C. Veatch, who had been connected with the United States Geological Survey for a number of years and engaged in work chiefly in the coal regions. He was the principal expert in behalf of the government in the trial of the case of *Diamond Coal Co. v. U. S.*, 233 U. S. 236 (R. 792-3). His testimony indicates a studied effort to bring the issues of the present case within those of the case referred to. Although he had done a great deal of geological work in the oil regions of other parts of the United States and also in South America, he had spent not more than two weeks in the examination of the California oil fields, only four days of this time being devoted to the Elk Hills (R. 774-8, 782). With the exception of a brief visit to the Elk Hills in 1910 (R. 778), he knew nothing about them or the conditions in the vicinity until 1912. He had had no practical experience in the production of oil anywhere (R. 737, 741, 748).

Unlike Dr. Branner, Mr. Veatch in his testimony assumed the attitude of a partisan special pleader, as, unfortunately, so many "experts" are prone to do. Probably this was largely due to the nature of his posi-



tion. He was employed by the Attorney General to serve as a trial assistant in scientific matters (R. 767). He assisted in collecting evidence, interviewed prospective witnesses and sat in court as the assistant and adviser of counsel for the government during the entire presentation of the case in chief (R. 783-7). It may well be assumed, therefore, that the theories of "oil value" suggested in the examination of other witnesses and advanced by him in his own testimony are those upon which the case of the government actually rests. Reference will later be made to other portions of his testimony (post pp. 76-83), but at this place we shall discuss only that which bears upon the mineral value of the lands in controversy.

He discussed at length the geology of the region and the seepages and other indications of oil in various places. As did other witnesses he assumed that the organic deposit in the township east of the lands in suit was an oil seepage, although he admitted that tests he had made with chloroform showed no oil (R. 712). Taking all these things into account, he concluded, attempting to speak as of the year 1904, that the Elk Hills were "oil lands" (R. 701). In the obvious effort to bring this case within the ruling in the *Diamond Coal* case, he likened the seepages and asphalt deposits many miles to the west and south of the Elk Hills to coal outcrops dipping in the direction of these hills. In this way he assumed that the exposed sandy strata in which these seepages appear along the base of the Tumbler Range might be carried by geological deduction from four to

ten miles out beneath the Elk Hills, thus furnishing a place "suitable for containing" the oil (R. 698).\*

He stated that the evidence was so "conclusive" (R. 712) that a geologist in 1904 must have regarded the Elk Hills as an "oil proposition", and that for this reason he would then "have advised the acquisition of these lands at a price in excess of their agricultural value" (R. 718). This is as far as he went on direct examination. No attempt was made by him to demonstrate that oil was known or could be known to actually exist in a single tract now in suit.

On cross-examination he was required to say in what respect the evidence was "conclusive", and replied, "It is conclusive in this: That I would advise a person to acquire that for oil land. I would advise him to drill it as oil land. I would not guarantee that he would get a commercial well" (R. 820, 823).

On being asked what he meant when he said this land had a *value* as "oil land", he replied, "The value of oil land—oil land has value which has no well and which has not been proven in the sense of proving it by a well. But it is a common commercial transaction to sell land

\* In making this assumption concerning the lateral extent of the sand beds "suitable" for oil reservoirs, he failed to note, or disregarded, the convincing geological evidence, pointed out by other geologists (R. 2751-7, J. A. Taff; 2392-6, 2452, 2463, F. M. Anderson), that the ancient shore line, which existed when the supposed oil formations were laid down, ran along the base of the Temblor Range, a number of miles south and west of the lands in suit (R. 2396, 2753). At that time the Temblor Range was a narrow line of islands (R. 2435, 2449, 2753), and, by reason of a familiar law of physics, the coarser sands and sediments carried into the then existing inland sea by the necessarily small surface streams and by wave erosion would be deposited close to the shore, while the sediments carried out to the region of the present Elk Hills, which are a very recent uplift (R. 2445-8, F. M. Anderson; 2754-5, J. A. Taff), would consist of fine silt and mud not at all suitable for the accumulation of considerable amounts of oil (R. 2423-7, 2454-7, F. M. Anderson).

and pay an oil land price for it where there is not a single well on the land and which is not proven in that way" (R. 825).

His exact conception of *value* in this connection is shown in the following answers given by him:

"Q. Did you mean when you used the word 'value'—

A. A commercial value as an oil proposition.

Q. Oil could be produced in paying quantities?

A. No.

Q. Then you used the word 'value' having some other definition in mind, did you?

A. I used it as having a value as oil land—having a commercial value as an oil property.

Q. Did you mean when you used the word 'value' \* \* \* that it contained oil enough to add to its richness?

A. I believed that it did.

Q. Did you know that it did?

A. No. I did not know that it did. That was my opinion as a geologist.

Q. Could you determine in any way that it contained sufficient oil to add to its richness? That is, that the oil could be extracted at a profit of even one mill on a thousand tons?

A. That cannot be determined.

Q. Then when you all the way through your testimony speak of this being proven oil land or valuable oil land, you nowhere mean to be understood as saying that there is sufficient oil there that it can be extracted with profit?

A. No; I mean that a man would be justified in buying that, perhaps, and paying an enhanced value, because of its oil value, and spending money in developing it" (R. 825-7).

It is apparent from these answers that the only value he had in mind was that of a mere speculative *prospect*. He was compelled to admit that the actual existence

of oil *could not be* determined from a surface examination. Further answers given by him show that in the use of the word "value" he did not have in mind the conditions when this patent was obtained but those of some indefinite time in the remote future. This appears from the following:

"Q. In your opinion then—I am now asking for your *belief*—there is a large quantity of oil under the Elk Hills?

A. I believe so.

Q. And at what depth?

A. I should say it may be under five thousand feet or it may be over.

Q. In 1904 could that have been mined at a profit?

A. No.

Q. Would it have been mined in 1904?

A. No. But there are a great many valuable mineral deposits that cannot be mined at a given moment that are perfectly good mineral lands.

\* \* \* I believe the Elk Hills will ultimately be developed into good oil lands" (R. 885-6).

Q. You say 'ultimately developed'. Will you hazard a prediction when that would be?

A. No.

Q. Will it be within the next ten years?

A. It is possible.

Q. And it is possible that it may not be for twenty years?

A. It is possible.

Q. Or a hundred years?

A. I think that is very remote" (R. 885-6).

The reason why he conceded that this land could not be developed in 1904 or even now was because the conjectural "oil horizon" located by him beneath the Elk Hills was then far beyond the reach of the drill. He stated that his assumed oil "might be even deeper"

than "four or five or even six thousand feet" (R. 967). Owing to the peculiar drilling conditions in California a four thousand foot well was out of the question in 1904 with the drilling appliances then known (R. 144). The usual maximum depth then attained was from 1200 to 1500 feet (R. 171-2). B. K. Lee, a practical driller called by the government, said that the deepest well at McKittrick in 1904 was 2250 feet deep and that this was considered an "exceptional well" (R. 231-2).

**3. Trial Court in this case decided on the basis of conjectural belief.**

It is significant that the District Court, in its decree in this case in favor of the government, expressed doubt as to the proof of the mineral value of the lands in suit. This appears from the following extract from the opinion of Judge Bean:

"The only question upon which I have had any doubt or difficulty is whether the evidence, notwithstanding the matters referred to, is sufficient to show that the patents should be set aside because the lands were in fact known oil lands at the time of the proceedings resulting in their issuance. There had been no actual discovery of oil within the boundaries of the land at that time but this was not necessary to determine their oil character. Oil like coal occurs in stratified forms of deposit, or rather, migrates into and permeates stratified deposits and follows them persistently and continuously, unless interrupted by some intrusion, to the end. Lands therefore may and often do become valuable for oil through adjacent disclosures and other surrounding conditions, although there has been no actual discovery within their boundaries" (R. 77).

This is a direct adoption of the theory expressed by the government expert A. C. Veatch (R. 698). But the learned district judge went even *further* and found as a *fact* that oil revealed at one place in the assumed "porous bed" would follow it "persistently and continuously to the end". No witness went so far and the court's assumption is at variance with all the evidence of practical and skilled men who have to deal with oil problems. The search for oil is not so simple. If it were the experienced oil expert Ralph Arnold would not have concluded that the prediction of oil in untried areas was "extremely hazardous" (R. 926).

No oil man feels justified in drilling a well four to ten miles away from an oil discovery, nor does he in fact find oil sands to be persistent (R. 1826-7, 1836-7, 1840, 1876-7, 1904-5, 1922-3). The best way to determine what experienced oil men knew and thought in this region is to consider what they in fact did. The evidence is undisputed that for years before and after 1904 they clung to a narrow belt along the base of the Temblor Range, from four to fifteen miles away from the Elk Hills. The intervening lands, which must have been of *known* oil value, according to the test of the District Court, were allowed to remain open and unclaimed for many years after 1904.

Nor does this test take into account any of the many uncertainties an oil man knows about. There is nothing said about an adequate source for the oil which is to be so widely diffused; nor about the probability of water preventing its migration; nor about the breaking off, or folding, or pinching out or changing in porosity of

the strata through which it is assumed to migrate; nor about the possible or even probable absence of sand beds in the Elk Hills in which the oil could accumulate. These are a few of the many uncertainties which caused so many witnesses on both sides to refer to the oil business as a "gamble".

The only limit placed by the District Court on the "persistent" and indefinite spread of this assumed saturated oil area was a possible "intrusion". There is no evidence showing that there are not hundreds of such "intrusions" between the Elk Hills and the McKittrick anticline, the nearest place where oil was known in 1904. Apparently it was assumed that none existed because none were known. In fact one very serious "intrusion" is known and its existence is not disputed. A deep synclinal depression lies *between* McKittrick and the Elk Hills and early wells drilled into this area showed that it is filled with water (R. 2180-5).

The District Court, however, assumed that the oil saturation continued from the McKittrick anticline across this deep syncline and into and across every acre of the lands in suit, a total distance of more than ten miles. No reason appears why the same deduction should not be carried entirely across the San Joaquin Valley, thereby calling in question the title of every farmer in that region. It might still be assumed there were no "intrusions" because none appear on the surface.

Only by making such an artificial assumption can the case of the government be sustained. Well might the trial judge express doubt as to the mineral value of the lands in suit. The existence of this doubt demanded

the dismissal of the bill, since it was the duty of the government to prove its case by "that class of evidence which commands respect and that amount of it which produces conviction" (*Maxwell Land Grant Case*, 121 U. S. 325, 379-81). Instead, this doubt was resolved in favor of the government, but this was done only by the acceptance of the government theory of mineral value based on belief or conjecture rather than on proven fact.

**4. Practical consequences which the adoption of the government theory would produce.**

Under an earlier head we pointed out the full substance and effect of the testimony of every government witness, save two, who gave testimony as to the mineral character or value of the lands in suit. One of the two omitted witnesses was J. W. Kaerth, a surveyor, who testified that there were numerous "asphaltum reefs" in the region in suit, but who declined later to attempt to point out any of them (R. 417, 423-4, 459-60). No other witness saw these asphalt deposits and the maps prepared by the government experts Veatch and Martin (Exhibits I and O) do not show any of them although they purport to show all such indications in that entire region. Mr. Veatch admitted that he found no such reefs (R. 801). The other omitted witness is J. R. Scupham, to whom reference will be made later (post p. 108), who claimed that as early as 1887 he informed certain officers of the railroad company that the Elk Hills "overlay an oil deposit".

reduced to its  
ultimate substance, amounts only to the expression of



an *opinion* that the Elk Hills *as a whole* had a speculative value in 1904 because of the *possibility* that oil deposits lay somewhere beneath them, the position, depth, character, quantity and even existence of this oil being entirely conjectural. We shall later show that a large number of experienced and skilled practical oil operators who were in that region in 1904 and earlier entertained a directly contrary opinion (post pp. 83-90). But, disregarding this latter testimony for the moment, we are concerned only with the practical consequences which would follow from the adoption of the government theory as a ground for recovery in this case.

It appears to be the contention of the government that if it was thought in 1904 by the agents of the railroad company, or by others, that the lands in suit were "oil lands", a case is made. But it is not asserted—and indeed the very contrary is urged—that the use of this vague expression "oil lands" means that these lands were then lands valuable for the extraction of oil in a commercial way, or even lands actually containing oil in any quantity. In fact, it was expressly contended by counsel for the government during the trial that it was "wholly immaterial" whether the land contained oil in paying quantity or not as the only question was whether it was considered to be "mineral land" (R. 1920).

It is apparent that if hope or suspicion that oil *might* be found somewhere in the Elk Hills can give to the particular lands in suit the requisite mineral character to warrant cancelation, the railroad company

may lose by judicial decree lands which subsequent drilling may prove to fall unquestionably within its grant. Such a result is hardly in accord with equity.

This fallacy in the present position of the government may be shown in another way. This Court has held that the grant of lands to the defendant railroad company by the Act of July 27, 1866 became a binding *contract* on the construction and operation of the road (*Burke v. S. P. R. R. Co.*, 234 U. S. 669, 679-80). "Then", says that case, "it became entitled to performance by the government. In other words, it earned the right to the lands described". The lands thus described to which the *right* was complete were all non-mineral lands (not otherwise disposed of) in the odd numbered sections lying within the limits of the grant. The lands in suit came within these limits. If they are *in fact* non-mineral they belong to the railroad company as of right.

From this it necessarily follows that only those lands may be lawfully taken from the railroad company which were in fact mineral lands at the time of patent. The expression "mineral lands" as here used is no longer open to question. It includes only "such lands as were at the time of the grant [patent] known to be so valuable for their minerals as to justify expenditure for their extraction" (*Davis v. Weibbold*, 139 U. S. 507, 524; *Deffebach v. Hawke*, 115 U. S. 392; *Diamond Coal Co. v. U. S.*, 233 U. S. 236, 239). As stated in these as well as other decisions of this Court the expression "mineral lands" necessarily implies "valuable mineral lands" in order not to exclude from agricultural grants

those lands containing minerals in such condition or quantity as to be economically unavailable at the time the proofs for patent are presented. And it is further necessary that the existence of these "valuable mineral lands" must be *known* at that time in order that apparently vested titles might not fail by reason of subsequent discoveries. This being the established law, the mere possibility in 1904, which is all the government has shown, that minerals might be discovered in the lands in question, cannot be substituted for the required showing that these lands were then "known to be valuable for their minerals".

If these lands were not thus known in 1904 to be "valuable for their minerals", the issuance of the patent now in question was entirely proper. It is fair to assume that in the use of the two terms "mineral lands" and lands "not mineral" in the various acts of Congress for the disposal of the public domain, *all* public lands were intended to be described. "Mineral lands" were those which could be acquired under the mining laws. Lands "not mineral" were disposed of by the homestead, railroad, school and other "non-mineral" grants.

Our contention that the patenting of these lands was entirely proper notwithstanding suggestions that they *might* contain oil is borne out by the practice of the Land Department of the government as applied to this very grant. In 1895, Secretary Smith directed the issuance of a patent to the Southern Pacific Railroad Company of lands near those now in suit notwithstanding a general protest that they were all "mineral lands",

saying that he could find no authority "after exhausting the means at my disposal to ascertain the nature of the land included in the grant, for suspending the issue of patents for the reason that perchance in some of the lands patented mineral may be discovered" (*Benjamin v. S. P. R. R. Co.*, 21 L. D. 390). All that the testimony indicates in the present case is that in 1904 "perchance" oil might be discovered somewhere within the area in suit.

But, if the present contention of the government is correct, there must be a third class not capable of disposal under any law (See comment of Circuit Court of Appeals on this, 249 Fed. at 797). It is conceded that a mineral patent would not issue for a single acre in the Elk Hills on the showing of mineral made by the government in this case. This is so because the evidence is not sufficient to prove a *discovery* of mineral (*Chrisman v. Miller*, 197 U. S. 313). Though this proof would not warrant a mineral patent, yet to justify cancellation of our patent it must be found by this Court to show *more* than a mineral applicant is required to prove. All he need prove is that he has discovered sufficient mineral to reasonably justify a *hope* of developing a paying mine. But to justify the extraordinary remedy of cancellation of a non-mineral patent the proof must be convincing that there is more than a mere hope of valuable mineral. The existence of the mineral must be shown as a known fact, in such condition and quantity as to make it then and there commercially valuable. That is, far more proof is required to take land out of the category established by its non-

mineral patent than is required to establish a miner's "discovery" (*Chrisman v. Miller, supra*).

This point is worthy of further emphasis. If there was not a sufficient "discovery" of oil on these lands to sustain a mining location, there obviously was not a discovery of oil sufficient to establish them as actually "valuable" oil lands. There is nothing technical or peculiar in the use of the word "discovery" in the mining laws. This word has the same meaning there that it has elsewhere. It means the ascertainment of the existence of the mineral, its disclosure. It is charged, however, that although there was no discovery of oil in the Elk Hills the defendant nevertheless actually *knew* it was there and in valuable quantities. We confess that we cannot understand how the existence of a thing may be *known* and its measure taken when it has not yet been discovered.

Another fact fatal to the government theory of this case presents itself. Unless these lands were known in 1904 to be actually valuable for the oil that was in them (and not merely speculatively valuable because of the uncertain chance of their containing oil), the government suffered no legal damage by their loss and the railroad company, as we have seen, gained nothing not due it under its contract. Without legal damage to the government there can be no relief on the ground of fraud. This is the rule which this Court has applied in a similar suit by a private individual (*Southern Development Co. v. Silva*, 125 U. S. 247). The same rule has been held to apply in suits by the government it-

self (*U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 285; *U. S. v. Stinson*, 197 U. S. 200, 205).

In conclusion of this branch of the argument we call attention to the breadth of relief possible if the government theory of mineral value is adopted. We have shown that the proof offered to prove the "oil character" of the lands in suit was not directed to show that oil exists in any given acre or section. It applies generally to the entire area of the Elk Hills, consisting of more than fifty square miles. If such evidence may justify cancelation as to one acre it must likewise serve to prove that the entire range of hills is valuable for oil, notwithstanding the undisputed fact that in recent years many deep wells have failed to find oil in various parts of the hills (R. 1794-5, Kinsey; 1953-5, Lang; Exhibit 16. See Map No. 6 in Appendix to this brief). The failure of these numerous wells necessarily weakens the force of the broad assertions of the government experts and illustrates the danger of attempting to rely on such evidence.

## B. LEGAL INSUFFICIENCY OF GOVERNMENT CASE.

### 1. But one broad issue in this suit.

From what we have already shown of the nature of the case made by the government it is apparent that the fundamental issue in this case is whether lands can be found to have been *known* mineral lands on evidence of opinion and conjecture which leaves uncertain the position, extent, economic value and even the actual existence of the asserted mineral. To put it another way, the issue is whether *belief* can take the place of *fact*.

The evidence which we shall hereafter discuss which shows that the real oil men in the vicinity and the agents of the railroad company did not know and did not even *believe* that these lands were valuable for oil, or that claimed to show the contrary impression, is really subordinate to this main issue. If the lands in suit were not known to be mineral lands at the time the proofs for patent were made, that is, were not then known to contain deposits of oil "of such quality and in such quantity as to render their extraction profitable" at that time, the inquiry is at an end, regardless of what may have been the belief or hope or purpose of the railroad company. Of course it is also true that if the railroad company did not know or believe that these were mineral lands, as defined by this Court, there was no fraud and can be no recovery in this case regardless of the actual character of the lands.

The case made by the government in its appeal to this Court leaves out of consideration both the question whether the lands in suit were actually valuable for the

*production* of oil in 1904 and whether this was then *known* to the railroad company. In its formal assignment of errors on appeal to this court (R. 3941) only three exceptions are taken to the ruling of the Circuit Court of Appeals and these exceptions are general and not in accord with Rules 35 and 40 of this Court. The first is that the court below did not find that the lands in suit were "mineral lands excluded from the operation of the grant". This does not disclose what is meant by "mineral lands", or when that character should have attached to them or when it became known. The second error assigned is that it had not been found that the railroad company had "falsely represented" that these lands were "non-mineral". This assignment has all the uncertainties of the first exception and in addition leaves out of account all question of good faith on the part of the patentee. If the lands did in fact contain valuable oil deposits in 1904 the representation to the contrary would be "false" even though no one then knew or even suspected that the oil was there. The third and last exception is "error in reversing the decree of the District Court". It is apparent that all that is in any degree specific in these assignments might be conceded and still the decree should be in favor of the railroad company.

## **2. The government relies on a showing of mere belief.**

The government case is founded entirely on the use of the word "belief" by this Court in the case of *Diamond Coal Co. v. U. S.*, 233 U. S. 236, 239-40, without recognition, apparently, of the fact that the context indicates that what was there meant by "belief" was



a *conviction* based on evidence so convincing as to exclude practical doubt. It is occasionally possible, as it was in that case, to reason from the known to the unknown so definitely as to produce practical certainty. In that case the commercial extent and value of the coal bed was proven at many points close to the land in suit. At one point this coal bed approached to within a few feet of the area in suit and it was nowhere more than a mile and a half distant. It dipped beneath the area in suit and croppings on the further side gave evidence of its persistence beneath the entire area. This Court said that this evidence "pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands" (p. 248). From this language it is apparent just what sort of belief was meant. It is that resulting from evidence so full and definite that it points with *convincing force* to a conclusion which includes not only the fact of the *existence* of the mineral but its extent and value as well. The recent case of *United States v. Beaman*, 242 Fed. 876, decided by the Eighth Circuit Court of Appeals, in which the *Diamond Coal* case was applied, illustrates the point we are making. This was also a coal case, but the proof of the coal was far less convincing and was held insufficient. The court ruled that the evidence must be so complete "as to make the fact plain" that the land "contained mineral deposits of such quality and value and in such quantity as to make their extraction profitable".

In the present case the mineral in question is oil, which is notoriously uncertain in its occurrence, extent

and value as compared with coal (R. 1024, Branner; 2771 Taff). Instead of there being a demonstrated commercial supply of this oil within a few feet of the lands in suit, or even a mile and a half away at the most, the nearest known oil was in a separate anticline four miles from the nearest lands and ten miles from the most remote (R. 1729). In Section 32 of the township east of the lands in suit was a doubtful seepage. The lands themselves were untested and the depth and character of the formations were unknown.

Under such circumstances a belief entertained by anyone in 1904 that these were valuable oil lands or, in the language of the government experts, merely "oil lands" could not have been a conviction that merchantable oil existed. Yet the government now insists that such a belief has been made *proof* of the actual mineral character of these lands by this Court.

In our view, this Court has fully guarded against such unwarranted use of the word "belief" in the concluding paragraph of its opinion in the *Diamond Coal* case, which reads:

"It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines" (p. 249).

The fact that mere "indications" of the existence of oil are not proof of its existence or of its quantity or location has received judicial recognition on many occa-

sions. In truth, the fact that oil is "irregular and otherwise unlike coal" may be said to have been generally conceded by every court having occasion to pass upon the matter, except only the trial court in the instant case (R. 77). The Circuit Court of Appeals, however, in its decision in this case, pointed out in detail the many differences between coal and oil (249 Fed. 785, 798-801).

In *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 806, the Circuit Court of Appeals for the Eighth Circuit, in speaking of an oil field in Kansas, said:

"The field was practically undeveloped and its extent was unknown. Experience in other oil and gas fields had demonstrated that wells drilled in the vicinity of producing wells were not infrequently unproductive. The only method of certainly determining whether or not particular lands contained oil or gas in paying quantity was by drilling thereon to considerable depth."

In the case of *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, 675, Circuit Judge Ross, whose experience is extensive in cases affecting oil lands, was called upon to determine whether a discovery of oil had been made in an undeveloped tract closely adjoining another tract in the Coalinga oil district in California, on which latter tract were several producing oil wells, both tracts being on the same anticline. In rejecting the claim of discovery he said:

"There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil.

But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. \* \* \* Indications of the existence of a thing is not the thing itself. \* \* \* Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself. If so, a location made upon the discovery of such indications, followed by the proper marking of the boundaries and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply for and upon due proof and payment, receive the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited."

It has been contended by the government that the decision of Judge Ross in this case, and other similar decisions arising under the mining laws, are of no importance to the present inquiry because the mining law requires the ocular demonstration of the mineral in an opening made on the land itself. But we do not so read the law or the decisions. The mining statute merely says that, "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" (Sec. 2320, Rev. Stat. U. S.). All that the word "discovery" means here is the ascertainment of the existence of the vein or lode *within* the claim. Such a discovery can rarely be made

with certainty except by a physical exposure within the claim, but even in the case of a lode it has been held that the exposure to the eye may be elsewhere (*Brewster v. Shoemaker*, 28 Colo. 176, 182). That is, the words of the statute, "within the limits of the claim", govern the place where the "vein or lode" must be and not the place furnishing the evidence of their presence *within the claim*. The statute concerning placer claims makes no special requirement as to the actual place of discovery. All that is required is that a placer location be made "under like circumstances and conditions" as a lode location (Sec. 2329, Rev. Stat. U. S.). The special statute of 1897 for the location of oil claims makes no change in this respect except the requirement that the proof show that the claim is "chiefly valuable" for oil (29 Stat. L. 525). Under the placer law it has been held that evidence of gold appearing within the claim, *held insufficient in itself to constitute a discovery*, might be supplemented by evidence showing greater amounts of gold disclosed in adjacent ground in a gravel bed apparently passing beneath the claim in question so as to make a showing of a complete discovery (*Lange v. Robinson*, (C. C. A.) 148 Fed. 799; *Cascaden v. Bortolis*, (C. C. A.) 162 Fed. 267). These cases really hold that the *evidence* which actually constituted the full discovery came from *without* the claims. That such a condition *might* also exist as to an oil claim under exceptional facts is indicated by the decision of Judge Ross in another case in which he overruled a demurrer to a bill which alleged a discovery of oil not disclosed in the claim but deduced from sur-

rounding conditions and developments (*Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681, 688-9.) It is obvious that the practical question, with which the mining law is alone concerned, is whether there is valuable mineral *within the claim*. Evidence which certainly indicates this is *discovery*, no matter where the evidence is found, and the word "discovered" is used in the mining law in exactly the same sense in which it was used by this Court in the case of *Deffebach v. Hawke*, 115 U. S. 392, 404, where it was said, "We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered."

Cases arising under the mining laws, in which it is held that oil is so uncertain in its occurrence and extent that surrounding conditions do not prove a discovery, are therefore directly in point. And they are of special importance since the *amount* of mineral which the miner must show to sustain his claim is far less than must be shown to overcome an agricultural patent (*Chrisman v. Miller*, 197 U. S. 313, 323).

In the case just referred to, in the decision rendered by the Supreme Court of California before it was appealed to this Court, this was said:

"To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of a country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be

other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon drilling a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery."

*Miller v. Chrisman*, 140 Cal. 444, 446.

As in the case decided by Judge Ross, this was said of a location made close to seepages of oil and not far from producing oil wells located on the same anticline. It is apparent that the same decision would have been made with even more emphasis if the land in question, as in the present case, had been in another range of hills and from four to ten miles from the seepages and development relied upon as proof of mineral value.

The case of *Olive Land, etc. Co. v. Olmstead*, 103 Fed. 568, also decided by Judge Ross, furnishes even stronger evidence of the judicial recognition of the futility of attempting to determine the existence of valuable oil deposits from surface indications. In this case the plaintiff had filed forest lieu scrip on the tract in question (but had not yet obtained a patent) and the defendant claimed it under an oil location. The plaintiff sued to quiet his right under his selection. The defendant answered setting up his location. He alleged that the tract in question "had no appreciable value for any purpose except for petroleum that may be obtained by boring or drilling therein; that it is in a well recognized petroleum producing belt, and that adjacent properties in the belt are actually producing petroleum in large and profitable quantities, and that the surface indications of such producing lands and upon the lands in

controversy are the same; that the surface rock and sand and the surface geological formation and stratification upon the lands in controversy are such as would lead any experienced petroleum expert or any practical geologist familiar with petroleum bearing lands in California to pronounce the same oil or petroleum territory, and chiefly valuable therefor; that one of the most pronounced and well marked anticlinal folds of sandstone and shale formation in Ventura County runs through the land in controversy and has its apex thereon, and that where said anticlinal fold is most exposed by a declivity which sharply cuts the same, bituminous sand several feet in thickness and 100 or more feet long is clearly visible, which sand, when excavated gives out a distinct odor of petroleum; that such bituminous sand, in the formation in which it is found, shows the land in controversy to be mineral or petroleum in character, and constitutes such a discovery as would justify any prudent miner in locating the same \* \* \* " (pp. 570-1). The plaintiff moved for judgment on the pleadings, which, of course, admitted what the defendant had pleaded. We therefore have here much stronger and more direct testimony of the "oil value" of the tract in question than the government has presented in our case. But because all the things alleged by the defendant were found by the court to be but "mere indications" of oil which was not *known* to exist in fact they were not held sufficient to overcome the "presumption" that the land was of the character indicated by the acceptance by the land officers of the plaintiff's selection.



This decision was quoted and followed by District Judge Bledsoe (whose experience in oil cases is even greater than that of Judge Ross) in the recent case of *United States v. McCutchen*, 238 Fed. 575, 591. This latter case is of peculiar interest in the present connection. The claim there in question is situated in the Midway oil field and lies between the Elk Hills and the Temblor Range, entirely within the area which the government geologist, A. C. Veatch, said was "conclusively" demonstrated to be "valuable oil lands" as early as 1904. The government, however, in the *McCutchen* case, sued to quiet its title to the land on the ground that McCutchen had made no discovery of oil on his claim prior to *September 27, 1909*, when the land was withdrawn from mineral entry. That is, the government alleged and proved in that case that oil was not known to exist as late as 1909 in an area which in the present case is claimed to have been known to contain valuable oil deposits many years earlier.

To the same effect as the cases just cited are the following: *Bay v. Oklahoma, etc., Oil Co.*, 13 Okla. 425; *Weed v. Snook*, 144 Cal. 439; *New England, etc., Co. v. Congdon*, 152 Cal. 211; *McLemore v. Express Oil Co.*, 158 Cal. 559.

The proposition that "indications" are not sufficient has also been recognized in the decisions of the Land Department. In *Dughi v. Harkins*, 2 L. D. 721 (not an oil case), Secretary Teller ruled that mineral character could not be predicated on a mere "theory" that the land "may produce" valuable minerals, adding "in other words, it is facts and not theory which must

control". This decision was quoted with approval in the opinion of this Court in *Davis v. Weibbold*, 139 U. S. 507, 522. In *Hutton v. Forbes*, 31 L. D. 325, 330, producing wells on "immediately adjacent lands" and strong indications of oil on the tract in question were considered proof of "actual or known mineral character", but there was no suggestion that the inference could be carried to lands miles away and in a different structure. In *Southwestern Oil Co. v. Atlantic, etc., Ry. Co.*, 39 L. D. 335, however, there were no producing wells close at hand but merely "indications" on the land itself, consisting of oil seepages and bituminous shale. This was held not enough for a discovery. In *Butte Oil Company*, 40 L. D. 602, locations were held insufficient which were based on a well containing a small amount of gas and a surface seepage of oil. The rejection of these claims was largely based upon the conclusion of an eminent geologist, Mr. Bailey Willis, that seepages were unsatisfactory evidence of oil at any given place beneath the ground because of the "irregular line of ascent of the oil from its unknown source" (p. 604).

### 3. Belief not based on clear demonstration is not proof of mineral character.

The courts have uniformly refused to permit belief to be substituted for actual knowledge. The *Diamond Coal* case, as we have shown, presents no exception to this. The cases so holding are numerous. From them may be cited: *Deffebach v. Hawke*, 115 U. S. 392; *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374; *Iron*

*Silver Mng. Co. v. Mike & Star Co.*, 143 U. S. 394;  
*Sullivan v. Iron Silver Mng. Co.*, 143 U. S. 431.

In passing on this point in *Iron Silver Mng. Co. v. Reynolds*, *supra*, in connection with the question whether a lode was *known* to exist within a placer claim, this Court said (p. 383):

“The court below instructed the jury that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with knowledge as prescribed by the statute, ‘for if, in any case, it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued on such application cannot operate to convey such lode or vein’; and further, that ‘that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute’.

“This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of the lode, knowledge of the fact.

“There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.”

The case just quoted is important to the present inquiry in another way, as it contains a fit characteriza-

tion of the sort of evidence that is relied on by the government to prove knowledge in this case. In speaking of the evidence offered in that case, this was said (p. 379):

“The evidence offered by the defendants, as to the knowledge of the patentees, was of a vague, uncertain and unsatisfactory character. It consisted principally of impressions, beliefs and inferences on the subject, drawn from loose statements made, or theories advanced by the patentees, or persons alleged to have been interested in the claim, or the supposed motives of their conduct.”

In the later case of *Sullivan v. Iron Silver Mng. Co.*, *supra*, this Court again condemned the confusion of belief with knowledge and the use of conjectural testimony, saying (p. 435):

“And after that, defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of *Iron Silver Mng. Co. v. Reynolds*, *supra*. Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal de-

posits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section."

The theory thus rejected by this Court is very like that adopted by the trial court in the present case, to which reference has been made (ante p. 33).

**4. Greater evidence is required to cancel a patent than would have warranted a refusal to grant it in the first place.**

Much of the argument of the government has appeared to be made on the theory that cancelation must be ordered in this case if the proven facts are such as would have justified the land officers of the government in refusing the patent in 1904. But this is not the law. The issuance of the patent created a new situation. In the absence of convincing evidence to the contrary it will be presumed that the patent was regular and proper. This suit is in no sense a writ of error or a rehearing to determine whether the evidence in 1904 justified the issuance of the patent. This is directly declared in *United States v. Marshall Mining Co.*, 129 U. S. 579, 588, in the following language:

"Some point is made, in the bill and in the argument, concerning the amended survey of the Tunnel Lode claim, and the manner of its presentation to the Commissioner of the General Land Office, with other irregularities which are suggested and pointed out; but we think it must be taken to be the settled doctrine of this court that a bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for

a rehearing in chancery or as if it were a mere retrial of the case as it was before the land office, with such additional proof as the parties may be able to produce.

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

**5. Fraud cannot be predicated upon the expression of an opinion concerning the existence of hidden mineral deposits.**

We have seen that the theory of the government is that the railroad company was guilty of fraud because it knew in 1904 or *ought to have known* that the lands in the Elk Hills were "oil lands", that is, lands so conditioned as to render it possible (or probable) that oil might be found somewhere within them. Such a state of mind would not be knowledge of the *fact* that valuable deposits of oil lay in the very areas in suit, but merely an opinion that it was or might be there or elsewhere in the same range of hills. The affidavit of the railroad selecting agent was in this case but an expression of his opinion that these were not "interdicted mineral" lands (R. 3829) and that "to the best of his knowledge and belief, none of the lands in said list are mineral lands" (R. 3833).

It is not claimed that the maker of this affidavit, or anyone else connected with the patentee, actually knew

or could have known in 1904 of any deposit of oil in these lands. The facts open to them at that time were equally open to anyone else. And the essential ultimate fact whether there was or was not a deposit of oil in these lands was hidden from them as well as from others.

This distinction between the expression of opinion which is not actionable and that of fact, which is, has been often pointed out. "The test by which to determine whether or not a representation is a mere expression of an opinion or a substantive fact, is this: If the representation is as to a matter not equally open to both parties, it may be said to be a statement of fact as such, but if it is as to a matter that rests merely in the judgment of the person making it, and the means of deriving information upon which a fair judgment can be predicated, are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment in reference to the matter for himself, the representation is a mere expression of an opinion, and, however incorrect, does not support an action for fraud" (*2 Addison on Torts*, Wood's Ed., Sec. 1186). "Again, it is an expression of opinion, and not a representation of fact, when the existence or non-existence of the matter spoken of, as a present fact, is capable of physical determination, but has not yet been definitely ascertained, and there is no such existing evidence in its favor or against it, except such indications of the probability of its existence as might legitimately give rise to a belief or opinion, but would not warrant

a positive assertion" (*Black, Fraud and Rescission*, Par. 77).

The case of *Southern Development Co. v. Silva*, 125 U. S. 247, 252, applies the distinction as we have just stated it, holding that the representation must be as to a *fact* to warrant relief in equity. It was charged that the defendant, in selling a mine, misrepresented the amount of ore in sight. This was held insufficient, this Court saying, "Besides, the quantity of ore 'in sight' in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mathematical or even approximate certainty. The opinion of expert miners, on a question of this kind, might reasonably differ quite materially."

In *Gordon v. Butler*, 105 U. S. 553, the plaintiff was told by the defendant that a quarry, then but slightly developed, but near a known valuable quarry, was worth at least \$48,000. On the faith of this statement the plaintiff loaned the defendant \$10,000 on the security of this quarry, and, on its proving to be worth less than the loan, sued to recover his loss on the ground of a false representation. In denying relief this Court said:

"To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of the



facts. \* \* \* Wherever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character, and no action will lie for its expression, however fallacious it may prove, or whatever injury a reliance upon it may produce."

In the case just cited this Court referred with approval to the case of *Holbrook v. Connor*, 60 Me. 578. In this case a vendor represented that land he sold was valuable for oil. When this proved untrue the vendee sued to recover damages. It appeared that at the time of the sale the land had not been tested and it was then unknown to both parties whether it was valuable as oil land, except so far as might be inferred from production of oil on neighboring lands and from a single well on the land in question. The court held that the representation was to be regarded as a matter of opinion and would not support the action.

These cases are so closely analogous to our own case that the principle they establish should be controlling. This principle is that neither law nor equity will grant relief where the right is uncertain. Relief is not denied because representations complained of are found to be mere opinions, but because the ultimate *fact* upon which the relief depends is not made certain.

The cases we have referred to have all been instances where it was represented that the lands contained minerals. The principle must be the same, however, where, as in our own case, the representation is that the lands are *not* valuable for mineral. In each case

opinion is equally uncertain and in each case the observable facts are equally open to all. The case of *Synnott v. Shaughnessy*, 130 U. S. 572, however, presents a situation similar in this respect to our own case. This was a suit by the vendors to cancel a sale of a mine on the ground that the vendee had concealed the fact that there was a valuable lode on the property. It was charged that this lode was discovered by an agent of the vendors and that this agent had colluded with the vendee in concealing this lode from the vendors and in obtaining a sale at a small price. The proof showed that at the time of the sale this lode had not been opened up or its value developed, but was indicated only by surface "float". A day or two after the sale the buyer opened up a valuable mine at the place where the "float" occurred. In denying relief this Court said (p. 579):

"Such purely surface indications, open to all ordinary observers, and situated on or near the path along which the plaintiffs travelled in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation. The fact, however, that there was no such discovery of an actual vein or body of ore demonstrates that there could have been no such fraudulent and collusive concealment and misrepresentation, as to its limit and extent, as is charged in this complaint. It required not only a considerable excavation, but also a great outlay of money and great labor on the part of the defendant to develop the existence of a vein of ore."

If the railroad company had known that there was a valuable oil deposit in any tract in dispute and had represented, as it did, that this tract was not mineral,

the government would have a right to recover the tract thus known to be valuable if it relied on the representation and not upon its own investigation. But the cases we have been considering show that if, at the time this representation was made, the actual character of the land was not known and could not be known, the representation actually made was but the expression of an opinion concerning a matter equally open to the observation of all, and, hence, not adequate warrant for cancelation of the patent. And these cases furnish further evidence, if any is needed, that this Court did not intend to make mere belief a substitute for knowledge and fact by its decision in the case of *Diamond Coal Co. v. U. S.*, 233 U. S. 236.

**6. Character and amount of evidence required to justify the relief sought.**

What we have discussed in the preceding pages naturally leads up to the consideration of the rules which this Court has on many occasions laid down as to the amount and character of proof required to cancel a government patent. Surmise and suspicion that fraud was accomplished or intended is not enough nor, in cases such as this, is evidence which leaves in doubt the essential character of the land sought to be recovered. The fundamental proposition is that the respect due to patent titles is such that they can be set aside by the extraordinary relief of cancelation only where the proof is clear, both that the government has lost what it was entitled to keep and that it has suffered this loss through the intentional wrong of the patentee.

We say "intentional wrong" because a careful and laborious search of the authorities reveals no case where a patent has been canceled for fraud except on such a showing. We are aware that it is now contended by the government that fraud may be predicated on what the patentee *ought* to have known, but did not in fact know or believe. Loose statements may be found in text books lending some support to such a conception of fraud, but, as stated, the courts have always required in cases of this sort that the proof should show some consciousness of the falsity of the representation complained of. Reference can here be made to only a few of the cases in which this Court has ruled, either directly or by necessary intendment that the fraud must be actual, that is, intentional. In *U. S. v. Stinson*, 197 U. S. 200, 206, relief was denied because the conduct of the defendant was found not to "indicate a consciousness of wrongdoing." In *Maxwell Land Grant Case*, 121 U. S. 325, 378, the established "honesty of purpose" and lack of "intentional fraud" decided the suit in favor of the defendants. In *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 299, it was found that there was "no such case made of intentional fraud, or actual fraud \* \* \* as justifies the cancelation of the patent." In *U. S. v. Iron Silver Mng. Co.*, 128 U. S. 673, 676, it was said that the false representation must have been "knowingly made". See also: *U. S. v. Clark*, 200 U. S. 601, 608; *U. S. v. Budd*, 144 U. S. 154; *Diamond Coal Co v. U. S.*, 233 U. S. 236; *Washington Securities Co. v. U. S.*, 234 U. S. 76.

In suits of this character the government, unlike a private suitor, is not required to return to the patentee any consideration he may have paid, as a condition to equitable relief (*U. S. v. Trinidad Coal Co.*, 137 U. S. 160). Such suits are therefore essentially penal in their nature. From this it follows that the damage to the government must be real and the fraud which caused it must be intentional, and the proof of each must be strong and convincing. Again, the issuance of the patent itself by a co-ordinate branch of the government is an act to which the courts must accord full respect. "Muniments of title issued by the government", says this Court in *U. S. v. Des Moines Co.*, 142 U. S. 510, 541, "are not to be lightly destroyed."

It is needless to refer to the many decisions of this Court defining the required measure and character of proof demanded in such cases. In the case of *Diamond Coal Co. v. U. S.*, 233 U. S. 236, 239, most of them are cited and their result is thus summed up:

"The respect due to a patent, the presumption that all the preceding steps required by law were duly observed, and the obvious necessity for stability of titles resting upon those official instruments require that in suits to annul them the government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect and that amount of it which produces conviction."

**C. THE PATENT IN THIS CASE WAS ISSUED SOLELY BECAUSE OF THE INDEPENDENT DETERMINATION BY THE GOVERNMENT THAT THE LANDS IN SUIT WERE NOT MINERAL LANDS.**

It is necessary for the government to show in this case that it was induced by the fraud of the railroad company to conclude that these lands were not valuable for oil. It is charged in the bill of complaint that by reason of the false affidavits of C. W. Eberlein, the railroad selecting agent, the officials of the government "were induced to and did omit to make any examination, investigation or inquiry" or to "in any manner adjudicate or determine whether any of said lands were in fact mineral or non-mineral in character" (R. 13-14). These allegations were made because they were necessary to the statement of a cause of suit. This Court has held that a false representation must be relied upon to be actionable either in law or equity (*Southern Development Co. v. Silva*, 125 U. S. 247, 250). This decision was in a suit between private litigants, but the rule is the same when the government is the plaintiff. "When the United States enters a court as a litigant," says Mr. Justice Field in the case of *United States v. Flint*, 4 Sawyer 43, "it waives its exemption from legal proceedings and stands upon the same footing with private individuals, and therefore, if on a consideration of all the circumstances of a given case, it will be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity though the United States be the suitor."

There was, however, an entire failure to support these allegations in the bill. In fact, the proof shows that the patent now in question was issued solely because the agents of the government had examined the lands in suit and reported to the General Land Office that they were not oil lands.

Going back to the time preceding the application for the patent it appears that the government land officers knew as much about these lands and of the general situation in the region as did the railroad company. In 1899, as we have seen, protest was made by the oil locators against agricultural selections in this region. E. C. Finney, the clerk in the General Land Office, who later had most to do in that office with the railroad selection of the lands now sued for, testified that in the latter part of 1899 that office received "various letters and petitions from people in California who \* \* \* represented that, unless the lands were suspended from agricultural disposition and the various forms of forest lieu selections, scrip, railroad selections and other non-mineral filings, patents would be obtained thereto under the agricultural laws without affording sufficient time to make adequate explorations for minerals, and the Commissioner was asked to suspend the lands from disposition for a reasonable time so that explorations might be made in areas alleged to contain oil" (R. 1581-2). As a result of these protests thousands of acres in this region, including the very lands in suit, were in 1900 withdrawn from agricultural entry because they were alleged to be oil lands (R. 1581-2; 1524). This shows that the attention of the government was called to the

possibility of there being oil in the Elk Hills several years before the patent issued.

Following this withdrawal, Jay Cummings, a special agent of the General Land Office, was directed to report whether any of these withdrawn lands should be restored to entry. On July 13, 1900, he sent a long report to the Commissioner in which he described in enthusiastic and even extravagant terms the oil possibilities of the entire southern end of the San Joaquin Valley, saying that petroleum might be expected to be found in "fabulous quantities" almost anywhere within the withdrawn area (R. 1528). In the same report he called attention to what he termed fraudulent attempts to gain agricultural titles to many portions of the withdrawn area. The allegations upon which this withdrawal was based and the report of Cummings must have impressed the land officials in Washington with the idea that the entire suspended region might be valuable for oil, so that no mere *pro forma* selection affidavit to the contrary could have made an impression. It is quite probable that Cummings made other later reports to the same effect. He stated in the report mentioned that it was his intention to make further reports. S. P. Wible, a witness for the government, testified that Cummings was in and out of the McKittrick district for several years after 1900 (R. 331).

The information received by the government land officials up to this time was general rather than specific. But in 1902, George H. Eldridge, a distinguished geologist connected with the Geological Survey (R. 929), made a study of the geology of the McKittrick region



in relation to the occurrence of oil. His conclusions were published early in 1903 in *Bulletin 213* of the Geological Survey. In this bulletin he discussed the McKittrick oil field and other adjacent fields and called attention to the fact that the McKittrick oil formation was very narrow and that there were other "parallel folds", his description of which would apparently include the Elk Hills and the Buena Vista Hills. As to these latter folds he said they were "apparently, so far as is at present known, without especial accumulation of petroleum" (R. 929-30).

This is an important contemporary statement by a distinguished and disinterested geologist that oil was not then known to exist *outside the narrow McKittrick anticline*. This bulletin was one of the official publications of the Interior Department and, if it became known to the officials of the Land Department, must have led to a material modification of the impressions produced by the Cummings report. It was known to the geologists of the railroad company in 1903, when they began work in this region, and must have served to confirm their own views and those of practical oil men as to the narrow limits of oil (R. 2378).

Following the issuance of this bulletin the railroad selection of these lands in the Elk Hills was filed on November 14, 1903 (R. 3754). The affidavits accompanying it merely alleged, in the general form prescribed by the government itself in the Regulations of July 9, 1894 (19 L. D. 21), that the selected lands were not "interdicted mineral lands" and that "to the best

of the knowledge and belief" of the selecting agent none of them were mineral lands (R. 3829, 3832).

These affidavits appear to have made no impression against the earlier idea of the government land officers that all the suspended lands might be valuable for oil. The selection was promptly rejected. The sole reason for the rejection was the withdrawal order of February, 1900, which was itself supported only by hearsay reports (R. 3756-7). It is obvious, therefore, that the land officials of the government were not convinced and misled by the selection affidavits in the manner alleged in the bill of complaint.

An appeal was at once taken by the railroad company from the order rejecting the selection (R. 3865). In a letter written by the chief counsel of the railroad company on December 9, 1903, to the land agent of the company the suggestion was made that a *hearing* might be had before the local land officers to determine the character of the land (R. 1577-8). This clearly indicates that there was nothing to conceal so far as the railroad company was concerned. In connection with earlier selection lists conflicting with this general withdrawal order the company had asked for such hearings (R. 1473). But about this time the government, instead of directing hearings in the usual way, had inaugurated the system of having specific tracts within the withdrawn area examined by its own special agents to determine whether they contained oil or not (R. 1528, 1483). This procedure did not apply to railroad selections alone, but seems to have been generally followed as to

any sort of application for a non-mineral patent within the withdrawn area (R. 1513-16).

Because of this practice, instead of at once asking for a hearing, the railroad company in this instance applied to the Commissioner of the General Land Office to have an examination made of the lands now in suit by a special agent (R. 1544). On December 10, 1903, the Commissioner replied that a special agent had been instructed to examine and report on them (R. 1483).

The direction to examine these lands was sent to E. C. Ryan, then a special agent of the General Land office. He appears to have been a man in whom that office had considerable confidence. He was the son of the Assistant Secretary of the Interior, and from 1904 to 1907 was in charge of a field division of the General Land Office at Los Angeles, California, with several men under him (R. 1547, 1604, 1607). Official correspondence in evidence further shows that he had been relied on for the examination of other alleged oil lands in the same region prior to this time (R. 1520-1).

On December 10, 1903, the Commissioner directed Ryan to examine the specific lands applied for by the railroad company in the Elk Hills (R. 1547). On January 22, 1904, Ryan reported to the Commissioner on this special examination, saying, "I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed

as mineral in character, and I respectfully recommend that they be relieved from suspension" (R. 1550). About 480 acres of the lands referred to in this report are not in this suit, but the evidence shows that not more than a day was given to these outside lands (R. 1972).

This conclusion of Ryan concerning these lands was accepted by the government land officials. His letter was indorsed as a "report on the mineral (oil) character of certain lands", etc. (R. 1551). The Commissioner, on February 11, 1904, in an official letter to the local land officers recited the finding of this special agent, *and nothing else*, as the basis for an order relieving these lands from the oil suspension (R. 1555-6). The rejected selection list was thereupon reinstated on February 26, 1904 (R. 3768, 3835). The list was then advertised for two months in a daily paper in the district (R. 3858), no contests or protests were filed (R. 3861), and the patent was thereafter issued on December 12, 1904.

No further proof of any sort was offered by the railroad company. It is true that on September 6, 1904, a "rearranged" list was filed by the railroad company to correct some purely formal errors in the description of the base lands for which the indemnity was asked, which amended list contained duplicates of the non-mineral affidavits filed with the original list (R. 3771, 3837-51). These affidavits, identical with those accompanying the first list, could have had no more probative effect than the first ones had.

It thus appears that the patent in this case was granted *entirely* on the authority of the Ryan report

with the possible assistance of the Eldridge bulletin. It is therefore not true, as alleged in the bill, that the government officials were "induced" by the railroad company not "to make any examination, investigation or inquiry" as to the character of these lands. We are not concerned with the effort which was made to belittle the qualifications of Ryan to make this examination or to show that he did it in a perfunctory way (R. 1598-1601). It is enough to say in this connection that the testimony of D. W. Maddux, a disinterested witness, who accompanied Ryan during his entire examination on that occasion, shows that he did go over all the lands in question and did endeavor to make a complete examination (R. 1970-3).

It makes no difference whether Ryan was competent or not or whether he made the right sort of investigation of these lands. He was the man chosen by the government to examine them. He did examine them and his report was accepted and acted upon. Not only did the government rely on his report as conclusive, but the railroad company was also led to accept it as conclusive. C. W. Eberlein, who made the selection of these lands for the railroad company, testified that when he heard through the letter of the Commissioner to the local land officers that this examination had been made and its result, he felt that the officers of the government had "backed up the non-mineral character of that land entirely" (R. 1162-3). There is not the slightest suggestion in the evidence that the report of Ryan was influenced by the railroad company, or that it was thought that he was not fully qualified. Eberlein testi-

fied positively that he had nothing to do with Ryan or his report, and that he did not believe that anyone else connected with the railroad company had (R. 1162). In fact, a letter written by Eberlein, on December 10, 1903, indicates a strong apprehension that Ryan was antagonistic to the railroad company and might report adversely on general principals if urged to hasten his examination (R. 1579).

The attempt made in this case to minimize the importance of the Ryan report to the detriment of the rights of the defendants may properly be met by what was said by this Court as to a similar attempt in the case of *Colorado Coal Co. v. United States*, 123 U. S. 307, 321. "If his official conduct was impugned," it is there said, "nevertheless his misconduct, if proved, was not imputable to the defendants, and they should not be prejudiced by the odium of an accusation against him. The United States had trusted him, and, inspired by that confidence, the defendants also had relied upon his official acts".

We have seen that the railroad company intended to ask for a hearing to determine the character of the lands now in question, and that this would have been done if the government had not chosen to proceed through its own agents to determine the matter. Even after Ryan had been directed to report on the lands it was the expressed purpose of the company, as shown by its correspondence, to ask for such a hearing before the local land office in case Ryan's report should be adverse (R. 1484-5). This is not surprising. In another similar case, a few years earlier, the railroad company

had established the character of lands in the vicinity of McKittrick by the taking of testimony before the local land office. In this case, *Tulare Oil and Mining Co. v. S. P. R. R. Co.*, 29 L. D. 269, only four years earlier, and during the excitement caused by the Kern River discovery of oil, the Secretary of the Interior had affirmed a decision of the local land officers holding that land *within a mile* of the outcrop and of producing wells at McKittrick was not oil land. This decision was reached in a case where the railroad selection was vigorously contested by locators, and it is hardly probable that lands in the Elk Hills, from four to ten miles farther away, would have been found to be oil lands in 1904, while the known oil area was still so closely confined to the narrow McKittrick anticline. If such a hearing had then been had as to the lands in suit there is little practical doubt that it would have resulted in a decision for the railroad company which would preclude the present charge of fraud.

But the government chose its own method of determining whether these lands were oil lands and acted upon it. Every act it did in finally granting the patent was based on its own independent investigation and decision. It did not rely on anything done or said by the railroad company in deciding that these lands were not oil lands. On the basis of this fact alone, the decision should be for the defendants.

**D. THE LANDS SUED FOR WERE NOT KNOWN MINERAL LANDS  
AT THE DATE OF THE PATENT.**

This branch of the argument has been largely anticipated in what we have said in an earlier part of this brief concerning the case made by the government. It is our purpose here to show somewhat more fully the geological theory upon which the government rests its contention that the lands in suit are "oil lands", and also to contrast this theory with the views of the experienced oil geologists and of the many practical oil men who testified for the defense. We shall point to what was actually done by these men in their search for oil during the time in question as a conclusive reply to the conjectures of the government experts as to what they would have thought and done if they had been on the ground in 1904.

**1. Artificial geological theory relied on by government.**

As already stated, the geological theories on which this case was rested by counsel for the government were the product of the mind of the witness A. C. Veatch. He prepared a map, Exhibit I, on which he represented a scattered line of asphalt deposits, oil sands and oil seepages extending a distance of thirty miles along the base of the Temblor Range from a short distance northwest of McKittrick to and beyond Sunset to the southeast. Assuming that all of these emanations came from the same general saturated stratum, he made the further purely artificial assumption that this saturation would extend laterally from this line of exposure half the distance of the line of exposure,



or fifteen miles (R. 702, 718). This distance would take in the lands in suit. From these two assumptions he drew the conclusion that "both the Buena Vista Hills and the Elk Hills fall within the proven area from geologic determinations" (R. 702). The wells which existed in 1904, he said, were merely a confirmation of this deduction, and he testified that he would have reached the same conclusion without the wells (R. 823).

We have stated this remarkable proposition just as it was advanced. We have done so because the government case really rests upon it alone. Mr. Veatch was the only witness who pretends to have determined that the Elk Hills were a "proven area" for oil in 1904. It is therefore important to know just how he reached his conclusion.

He admitted that this theory was his own invention and that he knew of no other geologist having applied it anywhere (R. 811). An analysis at once reveals why it was never applied elsewhere. His basic assumption is that his thirty mile line of oil indications were all in one saturated horizon. He was forced to admit that he had not endeavored to determine whether this was so or not (R. 835-7).

He further admitted that, if some of these indications were exposed on the upturned edge of a sedimentary bed distinct and separate from other beds in which the remaining indications appeared, his ratio of lateral oil saturation in the bed in question would only be one-half the exposed edge of this particular sedimentary bed

(R. 847-8). That is, if the exposed oil sands in a particular horizon were only five miles long, he testified that his "geologic determination" would extend to the side of that horizon for a distance of only two and a half miles (R. 808).

The witness J. A. Taff, an oil and coal geologist of long experience, who had had occasion in connection with his work to make a careful and detailed study of the geology of the entire region along the base of the Temblor Range, completely shattered this basic assumption. He pointed out the fact that the seepages, sands and other indications, used by Mr. Veatch to make his thirty mile line, appeared on the edges of at least three different horizontal beds separated by intervening layers of strata (R. 2758-9). And he further pointed out the fact that some of these seepages came from formations which were not porous enough to serve as oil reservoirs in a commercial way and which were in such position, that is, were so old and so deep in the general formation, that by no possibility could they be reached by the drill if their plane extended beneath the Elk Hills (R. 2777). Thus, on the face of the visible geologic evidence, even if Mr. Veatch's rule of lateral saturation were correct, the individual exposed "oil segments" are so short that lateral saturation could not reach the region of the Elk Hills in any instance.

Mr. Veatch's second assumption, concerning the extent of lateral saturation, was likewise condemned by all the geologists who testified for the defendants. F. M. Anderson, one of the most experienced and skilled oil geologists in California, and who had been engaged in the

mapping and study of the oil fields of the San Joaquin Valley almost continuously since 1903, testified that this line of seepages and other indications gave no warrant for assuming that oil would extend out even for a tenth of the distance of the outcrop (R. 2546). He also pointed out the fact, which Mr. Veatch evidently did not realize, that the sands capable of being saturated with oil could be expected to extend only a short distance from the ancient shore line evident along the base of the Temblor Range, owing to the tendency of the sands and gravels to be deposited close to shore (R. 2392-6, 2423-7, 2452, 2463). He explained, at a length too great to be even summarized here, the many uncertain factors of structure, water, faulting, diffusion of oil, absence of source for its supply, alteration of strata and sands, and other conditions which interfere with geological prediction, and stated, as the result of his long experience in the direction of practical oil work, that it was not possible for any geologist, no matter how well qualified, to decide the oil bearing character of land on the basis of structure alone (R. 2547). A geologist, he said, may infer the existence of oil and may with some assurance point out the places where oil can *not* be found, but the only way he knew to actually determine its existence was by drilling (R. 2548-9, 2621-2). The witness J. A. Taff also rejected the Veatch assumption as impractical and called attention to the fact that there was the same sort of a line of seepages and oil sands for a distance of a hundred and fifty miles along the west side of the San Joaquin Valley, which, he said, would make the "oil zone" extend seventy-five miles out into the

valley, if the Veatch assumption were correct (R. 2759, 2777). W. H. Ochsner, another experienced oil geologist, expressed the opinion that the Veatch hypothesis was "exceedingly unwise" and, if followed by drilling, might be "disastrous" (R. 2191-2).

This Veatch hypothesis, by which the "proven" oil character of the lands in suit is sought to be established, is obviously irrelevant, even if correct, unless it is shown that it was known and relied on in 1904. There is no evidence that it was. It is certain that the railroad company had no such notion. F. M. Anderson, the geologist, was in the employ of the railroad company in this very region in 1903, and for several years after that. We have seen that he had no confidence in any such theory. His associate in geological work for the railroad company in that region was Josiah Owen, now deceased. Mr. Anderson testified that he and Owen studied and discussed the geology of this region in 1903 and later, and that they were then in agreement in the conclusion that the Elk Hills "were a long way out from the foothills of the Temblor Range where the oil was likely to be", and that they were "too far away to ever be valuable oil territory" (R. 2383, 2388). This is confirmed by a map, reproduced as Map No. 4 in the Appendix to this brief, which Owen made in March, 1903, and on which he indicated all the lands "supposed to contain oil" as being close to the base of the Temblor Range. The only other man in the employ of the railroad company in that region prior to 1904, who was at all conversant with the oil business, was J. B. Treadwell. He was in charge of the development of oil for use as fuel

on the railroad from two small tracts of land leased from private owners on the McKittrick anticline (R. 432). This work was begun in 1899 (R. 164-5) and Treadwell remained in charge until he was succeeded by Owen early in 1903 (R. 424, 2907). During this time Treadwell prepared a map (R. 2903) for the information of E. T. Dumble, chief geologist of the company, showing what he then considered the limits of the possible oil territory (Exhibit 116, reproduced as Map No. 3 in Appendix to this brief). This map shows a very narrow line or area of possible oil territory confined entirely to the McKittrick anticline. This shows that if the Elk Hills were capable of being "proven" in 1904 by this recently invented theory these employees of the railroad company were not aware that it could be done. We shall show under the next head that those who were actually endeavoring to produce oil in this region at that time were equally without thought that there might be oil in the Elk Hills.

It is very apparent that the theory we have been discussing was advanced by Mr. Veatch in the effort to bring this case within the ruling in the case of *Diamond Coal Co. v. United States*, 233 U. S. 236. But he made the double mistake of assuming that oil evidences its occurrence in the same way that coal does and of carrying his deduction many miles farther than it was carried in that case. In this he finds no support in the testimony of any other geologist who appeared in this case. Dr. J. C. Branner, who also testified as an expert for the government, in particular failed to agree with him. According to him, coal mining is not subject to

the uncertainties of oil mining. "In coal mining", he said, "one can get a very close idea of the tonnage to be taken out under a given tract of land; that is, we can calculate the product. It is the rule, in fact, in the anthracite regions in Pennsylvania, that the company will have in its report by its geologist, 'We have so many acres of land. This land yields so many tons an acre', and they count on that just exactly as if it were money in the bank. Now in petroleum mining, of course, you can't do that exact thing; there is an element of uncertainty about it that you don't find in coal mining" (R. 1024).

The witness J. A. Taff, who had had long experience in the examination of coal deposits throughout the country while he was connected with the United States Geological Survey, explained the differences between coal and oil in more detail. Coal, he said, was usually laid down slowly over broad and low lying swampy areas where the conditions remained stable for long periods of time. When formed it stayed just where it had been deposited (R. 2766-7). Oil on the other hand is derived from a source and in a manner not fully understood. It is almost invariably produced from some other formation than that in which it originated. As a rule it is found commercially only in beds of sand. These sand deposits, under the conditions which prevailed in California, are local in character, as if formed by shifting currents and wave action close to the shore lines of former seas and lakes. As the extent of the sand is itself uncertain and the presence of the oil within the sand is still more uncertain, oil can be predicted with

far less assurance than can coal (R. 2766-7). He further testified that even in the case of coal he would not have felt justified in predicting its occurrence as far from the outcroppings as the Elk Hills are from the oil indications along the base of the Temblor Range (R. 2788-93).

**2. The real test of what was known is what was thought and done by practical oil men.**

The evidence shows that at the time this case was tried development for oil had extended from McKittrick to the southeast into and through the Midway Flat and into the Buena Vista Hills, thus opening up an immense oil territory which was untouched as to the greater part in 1904. To some extent this remarkable development is shown on the map prepared by the government witness F. O. Martin (Exhibit O, reproduced as Map No. 2 in Appendix to this brief). The wells which existed in 1904, both those which were productive and those which were not, are shown on Government Exhibit I, which is not reproduced in this brief on account of its size.

The greater part of this development has occurred since 1908. In 1899 the first successful oil well was drilled at McKittrick (R. 165). At that time there was not a well in the Midway Flat, which is now one of the most prolific oil fields in the world. The first well to strike oil in the Midway field was drilled in March, 1901 (R. 2059). This well was drilled in the foothills at the base of the Temblor Range and the wells which followed it still clung to these foothills until as late as 1907 (R. 2060-1).

Until long after 1904 not a well was drilled by a practical oil man in the Elk Hills or even in the Buena Vista Hills, which lie much closer in towards the oil "indications" along the Temblor Range. The first well was drilled in the Buena Vista Hills in 1909 and 1910. The witness John Pollard, who drilled this well, testified that it encountered a heavy flow of oil on February 2, 1910, and that on the following day there was a great rush to get drilling rigs into the Elk Hills because of the encouragement given by this discovery in the other range of hills (R. 1994).

This, in outline, represents the course of development in this region. There was no legal obstacle to prevent the development of the Midway field and the Buena Vista Hills in earlier years. Oil men are notoriously diligent in following up the quest for oil. There must, therefore, be a reason why they allowed these valuable areas to remain unclaimed so long. This reason is found in their firm conviction up to 1904, and later, that the only possibilities for oil lay close along the base of the Temblor Range. The real situation is well explained by the witness J. J. McClimans, a Pennsylvania oil man of long experience, who went to McKittrick in 1900, and who has remained in charge of oil properties in different parts of this region ever since. "From 1900 to 1905", he said, "the oil development was along the Temblor Range. The only place where there was any oil at that time between McKittrick and Sunset was in the Midway on Section 8, 32-23. Between that and McKittrick there was no development at all; while at McKittrick the development was south and west of the town. The



impression at that time amongst oil men was that the oil was very narrow and I know that they were afraid to go out one side or the other for fear they would get off the belt, and they hugged the Temblor Range pretty close. This continued to be the idea, to my knowledge, up to 1908" (R. 1932). David Kinsey, another experienced oil operator who came to this region before 1900, testified that up to 1905 and later the general belief among oil men "was that the oil zone was pretty well up in the hills from Sunset to McKittrick" (R. 1796). Even as late as 1909 one of the most experienced and successful oil men in that region told Kinsey that he was "crazy" to think of getting oil only a short distance from these hills (R. 1796). Kinsey himself went into the Elk Hills to drill for oil, but not until the rush of 1910. After drilling a perfectly dry hole to a depth of 4850 feet he gave up in disgust (R. 1794-5).

E. J. Miley, another practical oil operator in this region since 1900, testified that prior to the discovery of oil in the Buena Vista Hills in 1910 it would not have been considered "good judgment" to look for oil in these hills or in the Elk Hills (R. 1724). This is in line with the statement of the government expert, Dr. Branner, already quoted, that a geologist "would have been very bold indeed to venture the prediction of oil in the Buena Vista Hills" if it had not been discovered in the vicinity (R. 1992).

Many other witnesses testified to this general impression that the oil zone was narrow and close in to the Temblor Range, but reference can be made to only a few of them (R. 1826, 1887, 1974, 2007, 2060, 2077). Even

the government witness, H. A. Blodget, who showed a strong prejudice against the railroad company in his testimony, and who made hundreds of speculative locations in the Elk Hills during the oil excitement of 1899, admitted that he confined his actual drilling for oil close to the Temblor Range, because he considered that place "more certain" and regarded the Elk Hills as an "unknown" field (R. 393-5). The action of all these men in clinging close to the Temblor Range speaks far more persuasively of what was thought and known at that time than does the testimony of the witness who did not come into this region until later years or of those whose present testimony is unconsciously influenced by the developments which have since taken place.

In reply to the attempts of the government to show that the Elk Hills in particular were generally considered by oil men to be valuable for oil prior to the date of the patent now in suit, the defendants offered the testimony of twenty-five men, all of whom had been engaged in the oil business in that vicinity prior to and at the date of the patent. Most of these men were then actively producing or prospecting for oil in the McKittrick or Midway district. They were in a position enabling them to keep in close touch with current opinion as to where oil might be found. Unlike many of the government witnesses, they were searching for *oil* and not merely for "locations" to be held for speculation. Many of them were active in the search for new territory, either for themselves or for companies by whom they were employed, and therefore reviewed the possibilities of that entire region. If the Elk Hills were at that time *known*

to be oil lands, these men would inevitably have learned that fact. If there had even been a common impression that these hills were possible or "prospective" oil land, they would have heard of it. Most of them had occasion to go into the Elk Hills between the years 1900 and 1905, either to examine them for oil possibilities or for other reasons. Many of them had examined the alleged seepage on Section 32 of Township 30-24. And, with possibly two exceptions, they were men whose interests at the time they testified were entirely independent of those of any of the defendants.

It is not possible to discuss their testimony in detail within the space at our disposal, nor is it necessary to do so. Their names and references to the record where their testimony is to be found are inserted in the margin.\* With that unanimity that can come only from the

\* NOTE.—(1) E. J. Miley, operator at McKittrick since 1900 (R. 1715-16); (2) David Kinsey, driller and superintendent on "West Side" since 1896 (R. 1796-7); (3) H. C. Goodyear, at McKittrick from 1902 to 1905 doing general work around oil wells (R. 1818); (4) W. H. Cooley, operator and superintendent in McKittrick in 1903 (R. 1810); (5) S. J. Dunlop, operator in Midway since 1899 (R. 1820-1); (6) Fred H. Hall, interested in development of oil in Midway since 1901 and familiar with Elk Hills then and during recent development (R. 1824, 1826); (7) H. W. Thomas, operator of extensive properties on "West Side", in oil business since 1900 (R. 1829-30); (8) R. K. Howk, dealer in oil well machinery, operator of wells at McKittrick from 1901 to 1904 and engaged in examining prospective oil lands for other people at that time (R. 1842-44); (9) B. M. Howe, manager of oil companies, in oil business since 1898, drilling in Midway and examining surrounding country for locations in 1901 (R. 1887); (10) J. J. McClimans, operator in oil business since 1884 in Pennsylvania, and since 1900 in California, operating at McKittrick 1900-4 (R. 1932); (11) H. H. McClintock, superintendent of oil properties, superintendent pipe lines for Standard Oil Co. in McKittrick and Midway fields 1904-10 (R. 1974); (12) M. H. Whittier, operator of extensive oil properties in California and Indian Territory, twenty-three years' active experience, began operating oil wells at McKittrick in 1899 and in close touch with conditions there since (R. 1984-5); (13) C. A. Allison, sold oil well supplies in "West Side" 1900-3 (R. 1999-2000); (14) C. A. Barlow, oil operator in Midway since 1901, collected data for Barlow & Hill's maps from 1901 on, concerning oil development in "West Side" fields (R. 2007); (15) Chas. T. Burks, oil operator in Midway since 1900 (R. 2060); (16) L. E. Doan, operated oil properties in Kern River, Coalinga and "West Side" fields since 1900 (R. 2071); (17) L. B. McMurtry, oil operator in

clear truth of what they say, they testified that during all the years between the beginning of the oil industry in that region and the date of the patent in question, and even later, the common impression was that the oil lay in the narrow zone that has been described along the Temblor Range, and that the Elk Hills were not even considered to be within the range of *possible* production. They even failed to recognize the possibilities of the present Midway field at that time, although a few of them said that it was "suspected" that oil *might* be found there.

It has been claimed in argument that some of these witnesses lent support to the Veatch theory of the wide diffusion of oil. It is true that a few of them, in response to cleverly framed questions on cross-examination, made statements which, if taken without their context, might lend color to the claim that oil sands are persistent and continuous over a wide extent. The fact that these men acted on the assumption that the oil was in a narrow zone, is, of course, ample proof that they did not really believe that distant areas could be "proven" by deduction from surface indications or from existing development. Reference to the testimony of some of those who

Midway and elsewhere since 1900 (R. 2077); (18) E. W. Kay, oil operator in Midway since 1900 (R. 2085); (19) Fred Kimble, in oil business since 1900, at McKittrick and vicinity looking for oil lands in 1903 or 1904 (R. 2117-8); (20) John P. Kerr, fifteen years in oil business, engaged in looking for prospective oil land for large company in "West Side" fields from 1901 on, examined Elk Hills in 1902 (R. 2125); (21) R. E. Graham, oil operator in Midway since 1901 (R. 2132-3); (22) Samuel Shannon, oil operator, began oil business at Coalinga in 1898, went to "West Side" fields in 1904 (R. 2140-1); (23) U. S. Waugh, in oil business since 1898 (R. 2146-7); (24) C. A. Hively, field superintendent Kern Trading & Oil Co., in oil business since 1900, at McKittrick 1900-5 (R. 2161); (25) D. S. Ewing, attorney, interested in oil business in "West Side" fields since 1901 (R. 2250).

are claimed to lend support to the government theory, which testimony is similar to that given by the others, will further show that such claim is unfounded. H. W. Thomas, a practical oil man, as were the others to whom reference will be made, assented to a number of leading questions suggesting that oil might be presumed to "persist for quite a distance" (R. 1835-9). But when he was pressed to say that oil was a "probability" at the point thus defined only as being at "quite a distance", he replied that it would be no more than a "possibility" since oil men had found that it was not "safe" to draw deductions very far from their wells (R. 1837). He added that no oil man would assume that it was safe to drill for such a sand seven or eight miles away from producing territory and said that "even within one mile it would be a gamble" (R. 1840). The witness F. H. Hall stated that "oil sands generally have some uniformity in the direction in which they dip from the outcrop, except where they are broken up", but he added, "I do not mean to say that it is safe to assume that this will be true for several miles" (R. 1826-7). R. K. Hawk was asked many questions along the same line (R. 1859-64) and, although he did not dissent from the theory that oil sands might persist "indefinitely unless interrupted" (which is of course obvious), he added the practical remark that oil men "had tried by going out on the dip of the sand and failed to find it" (R. 1861), and recited instances where this had occurred in apparently promising areas close to producing wells (R. 1877). One other instance will be given as it is typical of the ideas of all these men. B. M. Howe, in answer to the

same sort of questions, replied that the oil sand might be presumed to continue "for a ways" unless it "pinched out" and said that "in nearly all oil fields the sand has a certain limit for oil, and when you pass that limit it is water" (R. 1904-5). It is apparent from the testimony of these witnesses that the continuity of the sand and the presence of oil within it are so uncertain that they can not be taken to have been *proven facts* in 1904 in the Elk Hills, from four to ten miles from then producing wells.

**3. There are no "indications" of oil in the Elk Hills.**

Much of the testimony introduced by the government was devoted to the description of a supposed seepage of oil in Section 32 of Township 30-24, just east of the lands in suit, and of other indications of oil in the Elk Hills. The testimony concerning these was so intermingled with references to seepages, oil sands and asphalt deposits many miles away along the base of the Tumbler Range that one unfamiliar with the entire record might gain the impression from this part of the testimony that there were many surface exudations of oil in the Elk Hills and even on the lands now in suit.

But that such is not the fact appears from the maps prepared and introduced by the government itself, Exhibits I and O. Exhibit I was prepared by Mr. Veatch, the chief expert witness for the government, and purports to show the oil wells that existed in 1904 as well as all the seepages or other forms of oil indications found by him or described by other witnesses (R. 111-13). This map shows only two such indications

anywhere near the lands in suit, one just east of these lands in Section 32 of Township 30-24, and the other to the west in Section 14 of Township 30-22. As these two places are situated at the ends of the anticlinal fold which passes through the lands in suit much importance has been attached to them as proof that there is oil in this anticline. On this map Mr. Veatch has indicated another place in the southeastern part of the Elk Hills and remote from the lands in suit, where one of the witnesses, who was without experience in the oil business, had found what he took to be a "very much dried" oil sand (R. 146). Mr. Veatch took this "indication" on faith and it does not appear that he ever saw it (R. 709). It also appeared that he never examined the alleged oil indication on Section 14 to the west of the area in suit but had merely observed the place where it was supposed to be in passing on a train over the line of railroad that runs near it (R. 776-7).

Exhibit O (See Map No. 2, Appendix to this brief) was prepared by F. O. Martin and J. W. Kingsbury, mineral inspectors of the General Land Office (R. 610-12). Unlike the former exhibit, the Martin map purports to show conditions as they existed in 1912. It is to be noted, that this map shows only *one* seepage or "indication" in the entire range of the Elk Hills, that in Section 32 of Township 30-24. He did not testify that he had made any test to determine whether this alleged seepage contained oil. Mr. Veatch, however, did test it with chloroform and found no trace of oil, but he explained this by saying that the oil had probably been "burnt out" in recent years (R. 712-13). The omission



of any possible indication of oil on the Martin map is important as he had spent a great deal of time from 1910 to 1912 in examining the entire range of the Elk Hills and claimed to be familiar with practically every foot of the region (R. 346, 610, 626-7).

We may take it as established, therefore, that these two maps show all the oil indications claimed to exist in the Elk Hills. As already stated in an earlier part of this brief, Jacob Kaerth, a surveyor, testified that he had seen "asphaltum reefs" in many places in the township in which the lands in suit lie (R. 417). Mr. Veatch admitted that he had seen none of these although he had been on every section in this township (R. 801-2). Frank Barrett said that he saw an oil seepage on Section 17 of the lands in suit in 1899 (R. 479-80). But as these lands were not then surveyed and as this witness showed considerable confusion as to his distances and directions, it is probable that he had in mind the supposed seepage in Section 32 in the township to the east. At any rate, no one else saw any seepage in Section 17.

Very little need be said of the "indication" in Section 14 to the west of the lands in suit. As we have seen, the witness Martin omits it. And other witnesses for the defense showed that it consisted merely of "wash" or "float" deposits of asphalt that had been carried down the canyon by water from the vicinity of McKittrick, where there are extensive deposits of asphalt. The witnesses Hotchkiss and Miley determined its real character as early as 1900 (R. 1745, 1789, 2090). Miley said that its character was so evident that any



competent geologist must have recognized that it was merely "float" (R. 1790). This explains why the government expert, Martin, did not mention it on his map. J. A. Taff, the geologist for the defendants already referred to, made a careful examination of this place and its vicinity in 1913 and found that the material observed there did not come from the formation but consisted of separate particles of asphalt, mixed with other detrital material, carried by the stream from the southwest (R. 2765-6). No attempt was made to contradict this testimony on rebuttal. We may therefore take it to be an established fact that there is no seepage at this place. Thus disappears the supposed evidence of oil at the western end of the anticline which passes through the area in suit.

The other supposed evidence of oil in Section 32 at the eastern end of this fold likewise disappeared. Great reliance was placed on this supposed "seepage" in the testimony for the government and it is very likely that misapprehension as to its true character caused many inexperienced oil prospectors to locate claims in its vicinity during the oil excitement of 1899 and later. It is also probable that subsequent realization that it had no connection with oil is what led to the early abandonment of all these claims.

The evidence shows that this supposed "seepage" is a purely local and surface deposit of vegetable matter, somewhat resembling peat, and having no connection with oil or with anything beneath. One or two of the government witnesses, who were not experts in making oil tests, claimed that they had gotten an oil showing

from this material by the use of chloroform. Although the chloroform test is the recognized method of determining whether oil exists or has existed, this test requires an amount of experience and skill not possessed by the ordinary man. An expert by this test can determine whether oil ever existed in a sand even though the sand appears perfectly dry and may have been exposed to the air for a century or more (R. 2764-5).

The geologist F. M. Anderson made a thorough examination of this deposit. He described it as a brownish colored surface deposit of organic material with a fetid smell and containing crystals of sulphur (R. 2474). From this it is apparent that the oil could not have been burned entirely out of it in recent years, as suggested by Mr. Veatch, since this would also have consumed the sulphur. Mr. Anderson tested this material with chloroform and other reagents, with the assistance of a chemist, but did not discover the slightest trace of oil (R. 2476-7). In his opinion this deposit did not have "any connection whatever with the occurrence of petroleum anywhere" (R. 2475).

The most thorough test of this deposit was made by J. A. Taff. In order to determine its extent and character he ran a cut clear through it from top to bottom, thus obtaining a cross section of the entire deposit and demonstrating that it had no connection with or impregnation from the formations below it. A short distance from the surface he found places where this material appeared moist and would "ball up" in the hand (R. 2760-2). This is the same thing which was observed at this place by the government witness

Drouillard in 1874 and 1899 and which led him and others to think that there was oil in this place (A. 121-2). It was to explain the disappearance of this supposed oil that Mr. Veatch suggested that the deposit had been burned since 1899. Mr. Taff also made a series of careful tests of this material but found no trace of oil but did discover that when it was dried it would burn like peat. He concluded that this place was not an oil seepage or petroleum gas "blowout" and that it had no significance in determining the character of the lands in the Elk Hills (R. 2761-2).

This evidence was so conclusive that no effort was made to rebut it. It is confirmed by a careful geological map of this region issued by the Geological Survey in 1910 (Exhibit F), which does not show a single oil sand or asphalt deposit anywhere in the entire range of the Elk Hills, although it shows them in great detail along the base of the Temblor Range. We are therefore able to say from the evidence that there is not a single oil "indication" in the Elk Hills or anywhere near them. With these alleged seepages gone at both ends of the anticline referred to and even from the entire hills, the sole remaining conditions upon which the possibility of oil in the Elk Hills could have been predicated by anyone in 1904 are the wells and seepages many miles away along the Temblor Range. It is, therefore, apparent that the artificial theory of Mr. Veatch, to which we referred a few pages back, must be adopted and applied in its entirety to sustain a decree for the government.

**4. The lands in suit have not yet been proven to be valuable for oil.**

It is our contention that these lands were not only not *known* to be mineral lands at the time they were patented but that they could not have been so known for the very good reason that subsequent drilling on sections interspersed with them has shown that the finding of oil is hopeless as to the western part of the township and doubtful as to the eastern half. It is obvious that if these lands are not now known to contain valuable deposits of oil the government was not defrauded in 1904 in any view we may take of the evidence. As to the lands which are sued for, it is conceded that not a drop of oil has yet been discovered in any of them.

We have already seen how the discovery of oil in the Buena Vista Hills to the south, in 1910, led to a rush into the Elk Hills. Following this discovery all sorts of people went in to these hills in the effort to find open lands on which to drill. This rush was like that which follows any important mining discovery. Even practical oil men and companies caught the fever, since the unexpected discovery in the Buena Vista Hills had upset their prior notions. The field manager of one of the large oil companies said that his company went in because "everybody was going in; we followed along like a lot of sheep" (R. 2051). Many such companies joined in the rush, including the Associated Oil Company, to be referred to later, of whose stock the defendant Southern Pacific Company owned fifty-one per cent (R. 1888, 1804, 2134, 3656-7). During this rush the present suit was brought.

It was not possible to obtain evidence showing the total amount expended in the Elk Hills for drilling following this influx. The proof shows a total of nearly two million dollars and the real figure is probably much greater. Wells were drilled from one end of the hills to the other, ranging from a few hundred feet to nearly five thousand feet in depth. These wells and their depths and results as to the discovery of oil are shown on Exhibit 16, prepared by the witness W. J. Luke from personal investigation in the field and from the evidence in this case (R. 2256-9). This map is reproduced as Map. No. 6 in the Appendix to this brief. *It shows that there were thirty-six of these wells drilled in the Elk Hills and that only three resulted in the discovery of as much as a gallon of oil.* These three were drilled by the Associated Oil Company and will be spoken of later. Before the evidence in this case was closed these hills were abandoned so far as the search for oil is concerned. One witness testified that he had ridden from one end of the hills to the other in December, 1912, without meeting a soul (R. 2134). Another said that in November of the same year all the properties were idle and that in some places the derricks had been torn down and hauled away (R. 2259). Another witness said that this region now looked to him "like a cemetery of disappointed hopes" (R. 2736).

On the western side of the township in which the lands in suit are situated the Scottish Oil Company drilled a well 4005 feet deep in Section 20, got nothing and abandoned the well and the section (R. 2041-2). This well was near the crest of the anticline and, there-

fore "favorably located" according to geological notions (see Exhibit O, Map 2, Appendix). The Redlands Oil Company, of which the government geologist Ralph Arnold was an incorporator (R. 1980), drilled a well 2850 feet in Section 30 of the same township, got what they thought was a "color of oil", thoroughly tested the well and then abandoned the ground (R. 1954-5). As an indication of the fallibility of geological prediction it is interesting to note that Mr. Arnold advised his associates that they would probably get oil at a depth of 1800 feet (R. 1981). Their failure confirmed his earlier published statement, already referred to, that the prediction of oil in an untried field is "extremely hazardous". Their experiment cost them \$50,000 (R. 1954). Another company drilled on Section 32 of the same township to a depth of 2425 feet, got nothing and abandoned its claim after spending \$45,000 (R. 1954). Another drilled on Section 28 of this township to a depth of 1670 feet, found some gas but no oil and abandoned the property in April, 1911, after spending about \$40,000 (R. 1953-4).

The witness John Lang, who had charge of the drilling of the last well mentioned, acted as adviser in the drilling of the other wells. In December, 1912, he testified that he thought the *eastern* part of this township was "possible" oil territory, but did not think there was any chance to get oil in that part of the township where the Scottish well was drilled. As to the other shallower wells already mentioned, the most he would say was that they might "have a chance" to get oil if they went

deeper (R. 1963, 1968-9). This is far from "clear and convincing" evidence that this part of the township is valuable for oil.

On the eastern side of the township all of the prospect wells were drilled by the Associated Oil Company beginning in 1910. Nine unsuccessful wells were drilled on Sections 22, 24 and 26 to depths ranging from a few feet to nearly three thousand feet. Three other deeper wells drilled by this company did encounter oil in quantities which for a time gave promise of being substantial. These discoveries were made in Sections 24 and 26 of this township and in Section 30 of the township to the east. These wells were respectively 3887, 4030 and 3838 feet deep and were the only wells in these hills that found more than a "color" of oil, though others were as "favorably situated" on the anticline and were as deep or even deeper. It thus appears that the only real evidence of oil anywhere in the Elk Hills was furnished by a subsidiary of one of the defendants *after* this suit was started.

Whether these three wells found oil in commercial amount has been the subject of much controversy. More than five hundred pages of the record (sent up as a separate exhibit) are filled with the confidential daily operating reports of those in charge showing the effort to make them productive. Detailed discussion of this evidence is unnecessary. The witness W. E. White, who was in daily touch with the drilling of these wells, has fairly summarized their record in three simple graphic charts (Exhibits 172, 173, 174). They were drilled by competent men and Mr. White testified that every

known means was employed to make them productive (R. 3170). They were finally shut down in August, 1912 (R. 3156), the production of each of them at that time not exceeding an average of ten barrels a day (R. 3125-6). This would barely pay the wages of a single pumper.

A few facts stand out prominently in connection with these three wells. They cost approximately \$60,000 apiece to drill, or more than \$15 a foot, and the total cost of all the work of this company in the Elk Hills was \$517,616.94 (R. 3124-5). Although two of these three wells gave promise at times of producing at the rate of more than 400 barrels a day (Exhibits 172, 174), their *actual* total production during more than a year of effort to make them produce was only 9941 barrels of oil (R. 3125-6).<sup>\*</sup> It has been sought in argument to materially increase this total by adding up the daily estimates of rate of flow appearing on the charts mentioned above. But Mr. White showed that these "estimates" of *rate* of flow have no real relation to actual production, which was determined by measurement of the oil as it was accumulated (R. 3206, 3250, 3381-2). From the above figures it appears that the oil actually produced cost about \$51 a barrel, considering the total amount this company spent in its work, or nearly a hundred times the then market value of the oil. The greatest monthly production of any of these wells was made by that in Section 24 in June, 1912, and did not equal a hundred barrels a day (R. 3126). The witness F. M.

<sup>\*</sup> The amount of 22,651.15 barrels given for one of these wells on page 3125 appears from the context to be a misprint in the original exhibit and should be 2,265.15 barrels.



Anderson showed by amortization tables, based on the experience of numerous other wells, that, even if these wells had shown a daily average of 100 or 150 barrels, they could never be made to pay for their individual cost of drilling and operation (R. 2497-2537).

We have seen that development in the western part of the township in question has shown that it can not be considered even as possible oil land at this time. As to the eastern portion it may be *possible* oil land, looked at in the light of recent development. Even to this extent it must be admitted that its character is shrouded in doubt. If doubtful now, after extensive testing in recent years, it seems too clear for question that in 1904 none of these lands could have been *known* to be actually *valuable* for oil. This Court has ruled more than once that the question whether land is known to be valuable for mineral must be answered in the light of the conditions at the time proof for title is made. If at that time the mineral was unattainable it could have no value then in a commercial sense. As earlier pointed out, it would have been impossible in 1904 to have drilled wells to the depths of these three wells in the Elk Hills with the appliances and methods then known. Many witnesses bore testimony to the fact that great strides have been made in recent years in drilling methods. The witness David Kinsey, who drilled a well in the Elk Hills in 1910 to the remarkable depth of 4850 feet, has described the reasons why it is so hard to drill deep wells in the soft and shifting California formations. He said that even in 1905 there was no machinery "equal to the attempt" to drill a hole 4000 feet deep.

In drilling deep holes, he said, it was necessary to case the hole from top to bottom with extra strong screw jointed pipe so constructed and applied that it could be raised or lowered and thus kept free to pass down with the drill. The available casing in 1904 was not of such design or strength as to stand the strain of long "strings" of it thus suspended from the surface. On this account he said that the ordinary wells in 1904 did not go to a depth of more than 1200 or 1600 feet (R. 1796-8). Therefore, even if the oil which the Associated Oil Company encountered in the Elk Hills had been far greater in amount and its existence had been *known* in 1904 by some sort of divination, it would not have been then valuable as it was unattainable.

The fact that the only *proof* of any oil at all in the Elk Hills was made possible by a company controlled by the Southern Pacific Company, and that this was done *after* the present suit was begun, denotes complete unconsciousness of an earlier fraud. Guilty men do not ordinarily thus assist in proving a material fact from which the imputation of their wrong may be drawn. The importance of this circumstance has not escaped counsel for the government. Various efforts have been made to reconcile it with the charge of fraud. It has been suggested that the railroad company allowed its subsidiary to drill lands interspersed with those in suit because revelation of the hidden oil was certain in any event through the acts of others seeking the same land. This explanation does not fit the facts. Plausible pretext could readily have been found to hold this and other land, without drilling, until this suit was disposed of, or

to delay the actual disclosure of the oil while apparently seeking it with diligence. The large amount spent and the strenuous effort to make the wells produce indicate the utter absence of such a plan. More convincing yet is the testimony of those in charge of the Scottish well in Section 20 to the west that they were encouraged and even assisted by the Associated Oil Company, which had no interest in their claim, to drill deeper when they had actually made up their minds to quit (R. 2043, 2046-7).

It has also been claimed that the Associated Oil Company did endeavor to conceal the extent of its discoveries and to wreck and ruin its wells so that they would be unproductive. But it can not be readily believed that more than half a million dollars would thus be thrown deliberately to the winds by sane men or that, in doing so, they would not have planned better to avoid even a showing of oil. The well casing could easily be driven clear through the oil sand, thus cutting it off until occasion came to open it up.

Without regard for consistency it has also been argued that those in control of the railroad company permitted the Associated Oil Company to discover oil because it was their purpose to gain fraudulent title to the odd sections in this township by the patent now in question and to obtain some of the even sections by means of mineral patents. The latter aim could be accomplished, it is said, only by diligent drilling and actual discovery of oil and for this reason the subsidiary company was given a free hand. Though apparently plausible, this suggestion does not accord with the way in which ordinary men might be expected to proceed in the effort to

conserve the fruits of a conscious fraud. The Associated Oil Company sought a mining patent to only a portion of three sections in this township, and its actual discoveries in this township would not entitle it to more than 320 acres. The railroad company owned but fifty one per cent of the stock of this subsidiary. If there had been a conscious fraud in obtaining the 1904 patent, the danger of disclosing the actual existence of oil would be apparent to those in control. Sane men, if guilty of concealing their knowledge of oil in a tract of six thousand acres which they desired entirely for themselves, would not thus deliberately disclose oil in sections interspersed with their own and thus put their larger holding in possible peril merely to secure a half interest in 320 acres, especially where suit had already been brought charging them with this fraud. The truth of the matter is that the conduct of the railroad company in connection with these wells can be explained only on the ground that there was no fraud and nothing to conceal.

**E. THE RAILROAD COMPANY DID NOT BELIEVE IN 1903 AND 1904 THAT THE LANDS IN SUIT WERE VALUABLE FOR OIL**

Much that has already been stated is applicable to this part of the discussion. It has been shown, we believe, that the lands in suit were not *known* by anyone to be valuable for oil at the time they were patented. The case might well be rested on this. But, in order to remove even the imputation that a fraud was contemplated, we shall briefly refer to the ample and convincing evidence proving the good faith of the railroad company in selecting these lands for patent.

At the outset we desire to call attention to one fact which clearly differentiates this case from that presented in *Diamond Coal Co. v. United States*, 233 U. S. 236. In that case the evidence showed that the defendant had no occasion to seek the lands there in question unless they were coal lands, as it could utilize no other sort. This alone was strong proof of a wrong intent. But in our own case this was not the situation. The railroad company was given a large grant of lands, good, bad and indifferent. Its selections were confined within prescribed limits. It had to take these lands or none at all. When its primary or base lands were taken by others, it could select indemnity lands which were even more limited and precarious in choice since no right of the railroad company attached to them at the date of the grant but only after they had been selected and this selection had been approved. Again, the railroad company was not engaged primarily in the oil business and acquired thousands of acres which had little, if any other than a grazing value. The evidence

shows that the lands in suit are of this character. At the time this suit was brought they were leased by the railroad company to sheep men for an annual rental, just as were thousands of other acres in the same region. One lessee testified that he held a lease for these lands together with more than 300,000 other acres of railroad lands (R. 1697). J. A. Ogden, a practical stockman, testified that he had lived in the vicinity of the Elk Hills and that he had grazed cattle in these hills for years and that there was good feed there for a considerable part of the year (R. 1982). H. J. Hart testified that for six months or more these hills had good green feed and that in places where water was applied the soil showed great fertility, and further stated that considerable water was encountered in some of the shallow wells drilled there (R. 2112-16). Ample justification therefore existed for selecting these lands, especially as very little indemnity land remained which could be selected (R. 1154-6, 1313).

A preliminary word of explanation is necessary in order to understand the relation to the issues in this suit of the various employees of the railroad company who will be referred to. The actual selection of the lands in question was made by C. W. Eberlein, who became land agent of the company in August, 1903, and resigned in June, 1908 (R. 1037, 1253). His duties were confined entirely to the selection and sale of lands (R. 1038-9). For many years before the advent of Eberlein, who was sent to California to take charge of land matters by E. H. Harriman (R. 1036), Jerome Madden (now dead) had been land agent. A distinct department

was engaged in the development of fuel oil for use on the locomotives of the company. This department, with which Mr. Eberlein had no connection, was organized in 1897 or 1898 with the employment of J. B. Treadwell to take charge of the development or purchase of oil for use as fuel on the railroad (R. 434). Specifically, Mr. Eberlein was land agent for the Southern Pacific Railroad Company, which owned the grant, and Mr. Treadwell was in the employ of the Southern Pacific Company which operated the road under a lease (R. 434), the latter company owning all the stock of the former. Mr. Treadwell went to McKittrick in 1899 and began the production of oil from two small leased tracts close to that town (R. 432). He had nothing whatever to do with the examination or selection of lands for patent (R. 434). Early in 1903 he was succeeded in this work of developing oil by E. T. Dumble, who held the title of chief geologist of the Southern Pacific Company (R. 2907). Josiah Owen, who died in 1909, was placed in immediate charge of this work (R. 2907, 1607). Mr. Owen, who was a geologist, was assisted in his field work by F. M. Anderson, the geologist to whom we have already made frequent reference. During 1903, a subsidiary company, known as the Kern Trading & Oil Company, was formed to operate the oil wells of the company and also to take over by lease such lands of the Southern Pacific Railroad Company as were thought to be "actual", "probable" and "possible" oil lands. This was done to take these lands out of the control of the land agent and thus prevent their possible sale to outsiders, as is explained by Mr. Kruttschnitt, who was

then general manager of the operating railroad company (R. 3084-5). This subsidiary company actually took charge of these lands in April, 1904 (R. 2946), but the lease itself was not finally prepared until August 2, 1904, at which time Mr. Eberlein positively declined to sign it. This circumstance will be discussed more fully later as great importance is attached to it by the government. The lands included in this lease lay to the south and west of those in suit, as appears from Map No. 7 in the Appendix to this brief.

**a. Evidence of John R. Scupham and Thomas J. Griffin  
directly imputing fraudulent plan.**

These are the only witnesses for the government who attempted to show that the railroad company consciously planned to obtain a patent to these lands because of the belief that they were oil lands.

The first of these witnesses said that in 1887 he was a "consulting engineer" for the directors of the railroad company (all of whom were dead when he testified) and that during that year he was sent to McKittrick by the general manager of the company (also dead) to report on whether the *asphalt* deposits at that place would justify the building of a branch road to McKittrick (R. 585-7). He testified that he spent part of the first day looking at the asphalt and then spent two days exploring the Elk Hills for oil from four to fifteen miles from the place he was sent to examine. He claims to have found several oil seepages in these hills (R. 587). On his return, he says, he reported to the general manager that the Elk Hills "overlay an oil deposit", which



information was received with gratification and the instruction to go to Jerome Madden, the land agent, to see whether this land had been surveyed so that it could be patented (R. 588, 595). He discovered that it had not been surveyed and says that Madden agreed that this land ought to be surveyed and selected at once as it was valuable for oil (R. 589).

At the most, if this testimony were true, it would show no more than the expression of a conjectural opinion and not knowledge that there was oil in the lands in suit. But even to this extent it does not accord with other facts. H. A. Blodget, a witness for the government, testified that the asphalt deposits at McKittrick were called to the attention of the railroad company by him *after* 1890 and that he induced the building of the road about 1893 (R. 361-3). It is also hardly probable at that early day, when little was thought of oil, that a man sent to examine asphalt deposits would conclude this work in a few hours and then spend two days at distant points looking for oil. And, although he says that Jerome Madden agreed that an application for a survey should be made at once, a simple procedure, and Madden remained land agent of the company for many years, these lands were not surveyed until 1902 and not selected until 1903. This was sixteen years after the alleged report of this witness and after Madden had retired from office and the general manager mentioned had been dead seven years (R. 593). W. E. Youle, another government witness, who had charge of the mining of asphalt at McKittrick in 1893, testified that the supply ran short and that he was told by a

representative of the railroad company that the road would be torn out unless more *asphalt* was found (R. 551). This indicates that oil possibilities were not in mind at that time. And Mr. Scupham admits that he never took up any land in the Elk Hills although in later years he was actually seeking oil lands (R. 607).

The true explanation of the testimony of this witness was furnished by a man who had known him for many years. William Hood, chief engineer for the railroad company, who knew Mr. Scupham since 1868, said that he "had a tendency to wish to appear to be well informed upon every subject upon which he might be questioned" and "that in order to continuously talk, facts as to the subject made very little difference to him". He added that it was commonly said of him that "the partition between his memory and his imagination was obliterated" (R. 3397-8). Mr. Hood, who had himself been connected with the railroad company since 1867, said that the last connection he knew of Mr. Scupham having with the railroad company was as a mere transit man in a survey party in 1872 (R. 3397). It further appears from the testimony of Mr. Scupham that he could very well have gained a familiarity with the region in suit from his activities in the oil fields in that vicinity in recent years.

The only other testimony directly imputing a fraudulent *purpose* is that of Thomas J. Griffin. He recited two conversations, one with J. B. Treadwell in 1902 and the other with E. T. Dumble in 1904. In the first, which he says took place in Texas, Treadwell showed him a map and pointed out the township now in suit

and told him that as a result of the reports of the railroad geologists as to its oil value a patent would be applied for (R. 1327-8). The second conversation, he said, took place in 1904 during the time he was in the employ of the Rio Bravo Oil Company, a subsidiary of the Southern Pacific Company in Texas, and while he was on a train about thirty miles east of the lands in suit. He claims that on that occasion Mr. Dumble pointed toward the Elk Hills and said, "Griffin, right over yonder about thirty miles is the biggest oil field in the world. I know it; so does all the rest of us know it. \* \* \* We have large holdings and expect to have more" (R. 1331).

This testimony is emphatically denied by both Mr. Treadwell and Mr. Dumble (R. 3413-20, 2970-1). There are many improbable features in the story about the Treadwell conversation which the latter pointed out but which need not be discussed here since the proof concerning the other conversation shows that the entire testimony of this witness was a deliberate falsehood. There is no doubt he testified merely for the sake of notoriety. It is to be remembered that he said that his conversation with Mr. Dumble was while he was in the employ of the Rio Bravo Oil Company. Mr. Dumble was in charge of this company and Mr. Griffin claimed that he was going to California with Mr. Dumble on business connected with that company. From the testimony of Mr. Dumble and from documentary records it appears that Mr. Griffin did work for that company between June 1 and September 1, 1904, and at no other time (R. 2972-3). A diary and other contemporary records

kept by Mr. Dumble showed that he had himself made several trips to San Francisco from Texas in 1904 but that Mr. Griffin did not accompany him and further showed that on none of these trips did he pass over or near the line of railroad on which this conversation is claimed to have taken place (R. 2967-8). Further than this it appears from numerous time rolls, receipts, and other papers signed from day to day by Mr. Griffin during the period he was working for the Rio Bravo Oil Company, and particularly from his own itemized *personal expense accounts* rendered to that company during each month of that time, that he was not out of the state of Texas on any day during this period except on two or three short trips to New Orleans (R. 2742-5, Exhibits 30, 31, 32, 33, 34). In a similar way, that is, by current documentary records made by himself, his continuous presence in Texas was established for almost a year before June 1, 1904 (R. 3539-43). It is therefore conclusively demonstrated that the incident and conversation he related could not have occurred. In fact, so clear was this that in the briefs and argument in the Circuit Court of Appeals no reference was made to him by counsel for the government. And by way of full measure a number of reputable citizens of Texas and California testified that he had a very bad reputation as to veracity (R. 3474, 3484, 3489, 3495, 3513, 3515, 3543).

**b. Belief of C. W. Eberlein, the selecting agent.**

The selection of these lands was made by Mr. Eberlein very shortly after he became acting land agent for

the company, which was in August, 1903. Prior to that time Jerome Madden had been land agent for many years under the supervision of the local officials of the company in California. Mr. Eberlein's position, however, was different. He came into office shortly after E. H. Harriman assumed control, and was sent by the latter from New York to investigate and reorganize the land departments of various roads in the "Harriman System" (R. 1036, 3081). Mr. Kruttschnitt, who was then in charge of the railroad as vice-president and assistant to Mr. Harriman (R. 3080), described Mr. Eberlein as a "nervous, energetic, strenuous person" (R. 3090). He at once discharged every employee in the land department except G. A. Stone, a land examiner, whom he made his assistant (R. 1040-2, 1188). Just before this he had been engaged in the reorganization of the land department of the Union Pacific, and, as he expressed it, had "put it in shape to sell (the land) and did sell it; sold it out very rapidly" (R. 1156). He desired to do the same thing with the Southern Pacific grant but found conditions much more "complicated" (R. 1157). One of the first things he discovered was that through what he considered the inattention of his predecessor large areas of indemnity land had been lost through tardy selection and that for this reason the company had about 50,000 acres of indemnity selection rights and little or no surveyed land to which these rights might be applied (R. 1154-5).

It had been his policy in his prior work to select indemnity lands as soon as they were available (R. 1180). On inquiry he learned that the lands in suit had just

been surveyed and he at once directed his assistant to prepare a selection list for them (R. 1157, 1313-15). As he expressed it, he "could not understand why they had not been selected at once". It has been suggested that he was instigated to make this selection by others. He was emphatic, however, that the selection of these particular lands was due entirely to himself and was positive that if anyone at all had interfered in the matter he would have remembered that fact (R. 1314-5). In truth, the evidence shows such intolerance on his part of the suggestions of others and such friction between him and other employees of the company at that time that his acceptance of a suggestion to select these lands would have been surprising (R. 1167, 1222-3).

At the time he made this selection he had no idea that the lands were or might be valuable for mineral of any sort (R. 1088, 1160, 1163, 1167, 1249-50). He asked Stone, his assistant, whether there was any mineral on them and was told that the latter was quite familiar with these lands and that they were not mineral lands (R. 1088). He was so thoroughly satisfied with what Stone told him of his knowledge of these lands that he did not consider it necessary to have any further examination made (R. 1137). When Stone's account of the character of these lands was shortly afterwards confirmed by the independent examination made by the government itself, he had no reason to consider a further examination (R. 1163). Mr. Stone testified that his knowledge of these lands was general from having been frequently in that region for two years preceding the selection and during the time he was a land examiner for the company (R. 1029).

The only evidence that the selection of these lands was suggested to Eberlein is found in the testimony of Stone, who at the time he testified was quite old and very infirm (R. 3115). The condensed statement of his evidence still bears some indication of the great uncertainty in his mind between surmise and fact. He said that these lands were selected "at the suggestion of Mr. E. T. Dumble, I think" (R. 1029). Again he said that he "thought" that Dumble "pressed the selection for reasons best known to himself" (R. 1030). He had been discharged by Eberlein later on and admitted that this had caused "some bitterness" (R. 1029). According to Eberlein, Stone was "pretty hostile" after this discharge (R. 1184). He had written vague threatening letters (R. 3115-19) due to resentment caused by his discharge and to a "nervous break-down" (R. 1182-7). Under such circumstances his uncertain surmise that he *thought* that E. T. Dumble had asked the selection of these lands is not at all convincing. He did not say that this suggestion had been made to him but the inference was that he *suspected* that it had been made to Eberlein, who, he said, directed the making up of the list (R. 1029). On the other hand, both Eberlein and Dumble testified that no such thing had occurred and it further appeared that these two men did not meet until nearly a year later (R. 1099, 1120, 1136, 1141-2, 1295, Eberlein; 2927-8, 2983, 3014, Dumble). Testimony of the vague and uncertain character of that given by Stone, even if not flatly contradicted by those against whom his suspicions were directed, is not of the sort which "commands respect" or "produces conviction".

**c. Belief of railroad agents who were directly concerned  
with production of oil.**

If there had been any thought that the lands in suit should be selected because of their supposed or possible oil value it seems obvious that it should have originated with those railroad officials and employees who were at that time interested in procuring oil for the company. The case of the government has been tried on the theory that such an idea did thus originate. We shall not attempt to review the entire evidence as to this feature of the case, particularly that part of it which deals merely with alleged hearsay statements and present impressions of what was or was not thought in 1904. Fortunately, we have in the record many clearly established contemporary acts and documents which show what was really thought by the railroad company at that time as to the character of the lands in suit. It is therefore not necessary to rely on later recollections which may be colored by subsequent happenings.

As already stated, the first railroad agent in this region who knew anything about oil, was J. B. Treadwell. He was employed to find oil land for the company and leased privately owned lands close to McKittrick instead of going onto any of the many sections then owned by the company in that vicinity. It appears from Exhibit 179 that prior to 1904 the railroad company had patents, some of which dated back to 1892, covering nearly every odd section in the present Midway oil fields, in the Buena Vista Hills and even in a large part of the Elk Hills. Notwithstanding this large area of land which has since proved valuable for oil in many places, Treadwell,



who was free to go where he pleased, selected land on the McKittrick anticline. This is a convincing indication that he did not then conceive that lands away from the Temblor Range outcroppings had a value for oil. A map prepared by him in 1902 (Map No. 3, Appendix to this brief) shows that he did not then believe that the oil land would extend beyond the narrow McKittrick anticline. It is true that he did recommend that large areas of the lands of the company should be withdrawn from sale in 1899, during the oil excitement of that time. This was done because speculators were buying them at small prices and Treadwell thought that these lands should be held until the company could determine for itself whether they might be oil lands (R. 425-7, 3469-70, Exhibit 115). In fact, this was somewhat the same sort of a withdrawal as that made by the government in 1900. Jerome Madden, the land agent, complained of these Treadwell withdrawals, as they interfered with sales and included very much more land than could be known to be valuable for oil. On being called to account by C. P. Huntington, then president of the company, Treadwell admitted that the reservations were far broader than his information justified but Huntington finally decided that the reservations should stand "as the company could just as well speculate in it as anybody outside" (R. 3470).

The claim that Mr. Treadwell believed that there was oil in the Elk Hills is based solely on the fact that in 1899, during the oil excitement, he was induced by some of his drillers to "locate" some claims in the township east of the lands in suit and in the vicinity of the sup-

posed seepage already referred to. He testified that these locations were made but further stated that as soon as he had a chance to examine the land he and the others concluded to abandon the locations and no attempt was made to keep them up (R. 436, 3426-7, Treadwell; 128-30, Jean; 134-6, Sarnow). The abandonment of these locations is convincing proof that he did not believe that there was oil in these hills.

The testimony offered by the government to prove that Josiah Owen, the railroad geologist, believed that the Elk Hills were oil lands consisted entirely of the recollection of various witnesses of what Owen had said during his lifetime. Testimony of this sort is notoriously unreliable. But, taken at its face value, it did not prove what the government contends, as will appear from a brief reference to what these witnesses said. S. P. Wible, a government witness who claimed an intimate acquaintance with Owen, testified that Owen told him in 1903 or 1904 that he "believed the Elk Hills might contain oil", that "the oil measures lay under them and he thought they would probably be so deep they couldn't be reached and made to pay" (R. 328). Other similar statements were related by this witness as having been made by Owen at that time and during later years, but none of them were more positive. C. F. Haberkern, another government witness, said that Owen told him in September, 1904, that the land in the Elk Hills was "very valuable for fullers earth and gypsum but he thought there was oil there but that it was very deep and wouldn't pay to go after it" (R. 350). No claim has been made in this case that these

lands are valuable for gypsum or fullers earth and the government expert, F. O. Martin, testified that there was not enough of either in these hills to be valuable (R. 683). W. H. McKittrick, another government witness, said that in 1907 Owen told him that he had found large quantities of fullers earth in these hills. "He said", added the witness, "there was a possibility of oil there but oil could not be found under thirty-four hundred feet; of course at that time no one thought of going thirty-four hundred feet for oil" (R. 528).

Owen may have thus speculated on the possibility of oil being found beneath these hills but this testimony does not show a very strong conviction on his part. His son, who had been in close touch with his ideas concerning this region in the later years of his life, said that he was told by his father in 1909 that he was certain that there was a great deal of fullers earth in the Elk Hills and that he thought "there was a chance of oil being there, but that it was deep" (R. 1638-9). This was five years after the date of the patent in question. It is apparent that even at this late time he was still very doubtful. We have already seen that in 1903 Owen agreed with the geologist F. M. Anderson that the Elk Hills were too far from the Temblor Range to be valuable for oil (R. 2382-3, 2388). In 1907 he said the same thing to W. H. Ochsner, another geologist who was associated with him in work in this region (R. 2172). And in 1904 or 1905, on his return from several days' examination of these hills, he told C. A. Hively, who was employed under him, that he "was

unable to discover any indications which led him to believe that there was any oil in the Elk Hills field" (R. 2161).

We are not left to the fallible recollection of witnesses to discover what Owen really thought. In March, 1903, he made a long geological report to E. T. Dumble in which he discussed the geology of the Midway and McKittrick region and suggested where oil might be found but did not mention the Elk Hills as an oil possibility (R. 1615-20). With this report he sent a map (R. 2977), which is reproduced as Map No. 4 in the Appendix to this brief. On this map, to which reference has already been made, the only lands he indicated under the legend "supposed to contain oil" are situated along the base of the Temblor Range. It is interesting to note that the largest areas thus indicated by him are entirely beyond the outside limits of the railroad grant (See Map No. 7). He does indicate an anticline running through the Elk Hills in Township 30-23, but did not suggest that there was oil there. This was a confidential map for the information of his superiors and there is no question of its authenticity as the legend is in the writing of Owen himself (R. 2977), who died before this suit was threatened. It is far more satisfactory evidence of what Owen then thought than is anything else produced in the case.

From April 1, 1903, Owen and F. M. Anderson worked together in this field (R. 2398, 2406-7). As earlier stated, it had then been determined that a subsidiary company should take over by lease all of the railroad lands which might possibly prove valuable for

oil so that these lands might be in control of the operating officials of the road. These two men were set to work examining the region and making up a list of lands to be included in the lease. Mr. Anderson says that their instructions were very general and that they were allowed to "follow their own devices" as to what land they should include (R. 2427). Mr. Dumble spent little time in the field except in visiting the wells which were in operation, but depended entirely on Owen and Anderson for geological information (R. 2909, 3001). As a result of the joint work of Owen and Anderson, the former submitted maps showing the lands which they thought should be included in this lease, one for the McKittrick field and surrounding region and the other for the Coalinga field about seventy-five miles to the north (R. 2910). From these maps and other data which he had received in the same way Mr. Dumble prepared a map which he sent to Mr. Kruttschnitt, the operating head of the railroad company, with a recommendation that the lands shown on this map be placed in the proposed lease. This map is reproduced as Map No. 5 in the Appendix to this brief. It shows these lands in three classes, "oil lands", "probable oil lands" and "possible oil lands". Of the third class Mr. Dumble said in his letter to Mr. Kruttschnitt, which was dated September 21, 1903, that their value depended "upon the continuance of normal dips and conditions" and that they represented "untested anticlinals which show good indications of oil" (R. 2913). The map shows that these merely *possible* oil lands lie to the south and west of the lands in suit, while the lands

designated as "oil lands" or "probable oil lands" are still farther away. That is, the outermost limits of what they then regarded as merely *possible* oil lands lay between the Temblor Range and the lands in suit. They did include in this category Section 31 in the township in which the lands in suit lie, but this was done solely because this and other sections along the same general diagonal line lay on the north flank of the extension of the proven McKittrick anticline toward the Buena Vista Hills (R. 2702, Anderson; 2953, Dumble). Map No. 7 (Appendix) shows that this lease when finally made up in August, 1904, and when renewed in 1907, followed the same general lines, except that Sections 11 and 13 of Township 30-22 were cut out of the leases.

All this shows that until long after the selection and patent of the lands in suit Mr. Dumble and those associated with him in the search for actual or merely possible oil lands did not include any part of the Elk Hills, though many sections in them were patented. Mr. Dumble, who was in active charge of all this work, has testified that he did not believe that the lands in the Elk Hills were to be thought of as oil lands in 1904 (R. 2905, 2928, 2988, 3014). He further stated that he had nothing whatever to do with the patenting or selection of these lands and did not even know that they were to be selected or had been selected until late in 1904 (R. 2983, 3014-15). His testimony in this respect is borne out so fully by correspondence and other records which he produced that there remains no reasonable ground for doubting the truth of what he says. Doubt has, however, been sought to be cast on what he

testified, as to his belief and that of Josiah Owen, by the introduction of evidence that he and Owen owned stock in the Eight Oil Company, which held locations on some of the even sections in the Elk Hills (R. 323). This evidence was so introduced and has been so used in argument as to create the impression that these claims were taken up in 1904. But it later appeared that these claims were located in 1907 (R. 351), that they were located for fullers earth only (R. 535-8), and that Mr. Dumble had no connection with this company until 1909 (R. 3044-50).

It has been heretofore argued by counsel for the government that the railroad company should have had a special examination made of the lands in suit by Mr. Dumble or his assistants before these lands were selected. The obvious answer is that there was nothing in the knowledge of the time or in the attitude of the government itself suggesting the need of such an examination. And, if it had been made, it would not have changed the situation. The conclusions these geologists reached at that time as to other lands in the vicinity indicate that such an examination would have but confirmed their then idea that these lands were far beyond the limits of possible oil. It is to be remembered that this question must be considered from the standpoint of that time and not of the present. The universal thought of practical oil men then was that the oil was confined within narrow limits far from the lands in suit. There was nothing known or thought at that time suggesting that it was incumbent on anyone to have lands so far away from what was believed to be pos-

sible oil territory examined by geologists on the bare chance that they might be valuable for oil. We have seen that even the government geologist Eldridge eliminated them from the range of possibility. And the failure of the railroad geologists to specially examine them is proof that they were not even suspected to be oil lands. If they had been, it is fair to assume that this fact would have been indicated on some of the confidential reports and maps prepared by the railroad company for its own use. And, in further proof of the limited conception of oil possibilities in 1904, Map No. 7 in the Appendix to this brief shows that the railroad geologists then failed to include in their list of oil lands some of the prolific Midway oil lands lying *between* the Buena Vista Hills and the Temblor Range, although they did include the Buena Vista anticline because it appeared to be a continuation of the proven McKittrick anticline. Much has been learned about this region since 1904 and this case should be judged in the light of that time, when the imagination of oil men was far more limited in its range than it is now.



**F. CORRESPONDENCE OF C. W. EBERLEIN, RELIED ON BY GOVERNMENT, DOES NOT INDICATE FRAUDULENT PURPOSE.**

Much was made by the government in the courts below of the refusal of C. W. Eberlein to sign the lease of 1904 to the Kern Trading & Oil Company and of certain correspondence which preceded and followed this refusal. In our opinion these matters have been given an importance far out of proportion to their real significance. In fact, in the decision of the District Court the correspondence referred to entirely displaced discussion of the real issue of the case as to whether the lands sued for were mineral in character and known to be such. Properly considered in the light of other facts in the case, this correspondence not only does not indicate fraudulent knowledge or purpose but proves the very contrary, as we shall point out. This was the conclusion reached by the Circuit Court of Appeals (249 Fed. at p. 802).

Before taking up the discussion of this correspondence, we desire to have this Court understand exactly what we consider to be the greatest possible legal bearing these Eberlein letters can have on the real issues of the case. Taken in their most unfavorable light, they show no more than that Eberlein may have thought oil *might* be found in the lands for which he was seeking a patent. This would be mere conjecture on his part and not knowledge that these lands actually did contain valuable oil deposits. Nothing short of such knowledge will satisfy the charge of fraud here made. The only permissible use of these letters, therefore, would

be to show a wrongful *purpose* on his part. Whether or not such a purpose, if found to have existed, resulted in fraudulent and actionable *damage* to the government must depend on other evidence in the case as to the character of the land sued for and what was *known* about it..

In connection with these letters one important fact must be noted. With one exception, they were produced by Mr. Eberlein from a file he had carefully retained in his possession after he left the service of the railroad company in 1908 (R. 1082, 1133, 1177, 1256). During the great San Francisco fire of 1906 these letters were badly charred and burned and practically destroyed. He had copies made from their charred remains and kept these copies until they were produced in court (R. 1134, 1258-61). There is nothing to show that he did this because of a desire to injure the railroad company. On the contrary, he testified that he kept this file for his own "protection", or, as he further explained, "for the protection of the *railroad* company and myself" (R. 1128, 1134). He also said that Judge Cornish of New York, his superior officer in charge of land matters, told him to "keep it close for my own protection as well as his own" (R. 1279). As appears throughout his testimony, he and Judge Cornish were strenuously opposed to having a lease made to the Kern Trading & Oil Company of a large area of railroad lands which would otherwise have remained under their own dominion. The Eberlein letters contain a host of arguments against such a lease. It is evident that he intended to defeat it at any cost. In fact, he never did

sign or consent to it in any way up to the time he resigned in 1908, although he knew from 1904 that the lease was actually in force and being acted upon by everyone else although unsigned by him (R. 1120, 1221).

Guilty men do not ordinarily thus preserve the only evidence of their own guilt. The contention of the government is that these letters show a guilty purpose *on the part of Mr. Eberlein*. If so, he must have been aware of both the guilty purpose and of the significance of the letters. Why, then, should he have so carefully preserved them and why should he have restored them after the fire of 1906 had furnished a convenient excuse for their destruction and had destroyed the files of his associates? The only explanation consistent with ordinary experience and probability is that he did not think that they indicated a fraud on his part or that of anyone else and did think that they would justify something he had done. He kept these letters because he thought they would be a "protection" to him in case it should be claimed at some time that he had acquiesced without protest in the execution of a lease depriving his department and the Southern Pacific Railroad Company of control over such a large body of lands. In one of these letters he stated that he feared that the subsidiary company to whom the lease was to be given might "fall into hostile control" to the damage of the company he represented (R. 1077). He testified that in saying this he had in mind the experience of some of the eastern coal roads and feared that E. H. Harriman might sometime question the making of this lease (R.

1239, 1256). For this reason he determined to make and preserve a "record" of his own position (R. 1196).

Mr. Eberlein belonged to the New York office of the railroad company. In 1903 he was sent to California, at the suggestion of Mr. Harriman, by W. D. Cornish, who was vice-president of the Southern Pacific Railroad Company and in charge of its land affairs (R. 1074, 1096). The primary purpose of his mission was to investigate railroad land administration in California. Mr. Eberlein testified that he never conceded the authority of anyone in California to control him and acted on the assumption that he was "solely in charge" and, he added, "I insisted on doing the thing in my own way" (R. 1167, 1233-4). He admitted that this attitude and the manner of his appointment brought him into frequent "collision" with other officers of the company and said that "the only surprise in the situation is that I lasted as long as I did" (R. 1223).

Shortly after his arrival in California in 1903 he was made *acting* land agent of the Southern Pacific Railroad Company to succeed Jerome Madden. This position was not sought by him and he was anxious to close up his work and get out of it as soon as possible (R. 1301). He at once discharged every employee in Madden's office except the land examiner, G. A. Stone, whom he made his assistant (R. 1188). His attention was early called to the fact that the company had lost a large amount of indemnity lands because of failure to make prompt selections (R. 1154-5). He inquired about recent surveys and learned that one had just been made of

the township in which the lands in suit are situated. "I know I could not understand", he says, "why they hadn't selected it at once. It was always the plan in my time to get after indemnity as soon as it was surveyed" (R. 1157-8). There is no doubt he urged this selection vigorously, as such was his habit. "Mr. Eberlein", testified Mr. Kruttschnitt, "was a nervous, energetic, strenuous person; everything he went into, he went into apparently heart and soul as if it were the only thing to be attended to" (R. 3090). To the suggestion that Stone may have instigated this selection Mr. Eberlein emphatically demurred, saying, "I instigated Stone" (R. 1181).

On November 14, 1903, he filed his selection list for the lands in suit. This list was rejected by the local land officers because the lands were within the area which had been withdrawn from agricultural entry by the blanket order of February 28, 1900 (R. 1159-60). An appeal was taken by the railroad company from this rejection on December 11, 1903 (R. 3864). In connection with this appeal Mr. Eberlein wrote his letter of December 10, 1903 (R. 1577), to D. A. Chambers, attorney for the company in Washington. This is the first letter quoted in the opinion of the District Court as an indication of fraud (R. 74). In this letter, after complaining in his characteristic way because the appeal had been signed by one of the attorneys for the company instead of by himself, he said:

"I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it.

"I have had in mind the suggestion you made some time ago in regard to inducing Mr. E. C. Ryan, Special Agent at Los Angeles, to make his report.

"I am not acquainted with Mr. Ryan and it is a matter for serious consideration as to how to approach him.

"It would not do, certainly, to ask for a report recommending the release of the lands selected by us from suspension. In my opinion it would not be politic to ask for a release in any particular district.

"Mr. Ryan would, in all probability, jump at the conclusion that the railroad had some special information in regard to that district, and the result would probably be that our request would have the opposite effect from that desired.

"All that I could do would be in a general way to ask him to submit a report of the lands covered by the order of suspension, which, as you know, embraces a very large area.

"How would it do to ask the Department to suggest to Mr. Ryan that he make a report of so much of the lands within the suspension limits as he has examined up to this time?

"It might be that such a report would cover the very district in which we are operating, and we would then be relieved from the danger of having called particular attention to any locality" (R. 1578-9).

Mr. Kruttschnitt was then general manager of the Southern Pacific Company and in charge of the operation of its trains. He was also assistant to the president, E. H. Harriman. He testified that he had been directed by Mr. Harriman to assist Mr. Eberlein generally in his work, but that he had nothing to do directly with the selection of lands for patent. On being asked if he were specially interested in the lands now sued

for, he said, "I was not. My interest was simply and solely to carry out the instructions of my superior officer, the president, to help matters on that Mr. Eberlein was engaged in" (R. 3094). He further testified that in 1903 or 1904 he had no information or belief derived from Mr. Eberlein, or from any other source, that the lands in question were or might be oil lands (R. 3083, 3089).

It is probable that Mr. Eberlein used Mr. Kruttschnitt's name in this letter merely to stir Mr. Chambers into more rapid action. As usual he was in a hurry to get results. The tone of the entire letter indicates that he suspected a lack of enthusiastic cooperation on the part of the company's law department with which Mr. Chambers was connected. The letter is singularly frank and open, yet it contains no statement indicating that he then even thought that the lands selected were *within* the oil territory. All he said was that they *adjoined* the oil territory. To a certain extent this was true as they lie from four to ten miles east of the then known oil territory. We have already noted that he was greatly concerned because of the large losses of indemnity lands the company had already suffered. Possibly and probably he feared that this land, because of the mere fact that it was near an oil district, might be taken up by speculators if the company selections were not promptly approved. In one of his later letters, to be hereafter quoted, he refers to this very danger (R. 1079).

The references in this letter to E. C. Ryan, the government's special agent who later examined these lands,

prove beyond question that the acts of Mr. Ryan were in no way influenced by the railroad company. In fact, Mr. Eberlein quite evidently feared that Mr. Ryan would, on general principles, report adversely if he were informed that the railroad company was interested. In this connection he testified that he never saw Mr. Ryan or communicated with him in any way (R. 1161-2).

In January, 1904, E. C. Ryan completed his examination of these lands and reported to the government that they were not oil lands (R. 1549). As a result, the general withdrawal order of February 28, 1900, was canceled as to these lands, the application of the railroad company was accepted and the patent was issued on December 12, 1904. In the meantime the selection had been duly advertised and no protests had been received. During all of this time there is no evidence that information had come to Mr. Eberlein or anyone else connected with the company to indicate even a suspicion that there was oil in these lands. In fact no such information could have come as no development had taken place and no oil had been discovered except that from four to ten miles away and in a different range of hills.

We have seen that prior to the date of this patent the operating department of the Southern Pacific Company, under the direction of Mr. Kruttschnitt, had taken possession and control of all patented lands of the Southern Pacific Railroad Company then thought to be "actual", "probable" or "possible" oil lands. Only a few years earlier, Jerome Madden, who preceded Mr.



Eberlein as land agent, had sold large areas of railroad land on the eastern border of the San Joaquin Valley for \$2.50 an acre, many of which lands later proved to be valuable for oil. On this account the operating officials of the company, who wanted the oil for locomotive fuel, decided to take the control of all possible oil territory from the land department in order to prevent similar sales (R. 3085). Pursuant to this plan Mr. Kruttschnitt caused the Kern Trading & Oil Company to be organized in May, 1903, to act as the "fuel bureau" of the Southern Pacific Company (R. 3085). As already related, E. T. Dumble, the chief geologist of the operating company, with the assistance of his subordinates, prepared and submitted a map (No. 5, Appendix) to Mr. Kruttschnitt in September, 1903, showing the lands to be taken over under the three heads of "actual", "probable" and "possible" oil lands. The fact that the lands now sued for were not then patented was, of course, sufficient reason for excluding them from this map. But the company did own at that time at least ten other sections in the Elk Hills as favorably situated as the lands now in question (Exhibit 197). None of these were listed by Mr. Dumble as being even *possible* oil lands although there were no restrictions placed on him as to what lands he should include and he was unaware until October, 1904, that the lands in suit had been selected or that it was intended to select them (R. 2953).

The lease transferring the lands designated on the map prepared by Mr. Dumble was finally completed, and signed on August 2, 1904, by C. H. Markham, who

succeeded Mr. Kruttschnitt as general manager of the Southern Pacific Company. On that date Mr. Markham presented the lease to Mr. Eberlein and asked him to sign it as land agent of the Southern Pacific Railroad Company, the lessor (R. 1111). Mr. Eberlein refused to do so and the further correspondence quoted by the District Court as proof of fraud followed this refusal and the insistence of Mr. Markham that the lease should be executed.

The first letter referred to in this connection was written by Mr. Eberlein to his superior officer, Judge W. D. Cornish, who was in New York. It appears in full at pages 1075-9 of the record. As it is long, only portions will be here quoted. Mr. Eberlein began with a complaint about the Kern Trading & Oil Company. "I am totally in the dark", he said, "as to the objects, rights, etc. of this corporation. I have asked for information several times, but it has never been furnished me". He then mentioned the proposed lease, saying, "This lease was concocted without any reference to me, and it has now been sent over for me to execute on behalf of the Southern Pacific Railroad Company. \* \* \* Inasmuch as the lease is made by the land department and the head of that department is taking the responsibility therefor, it does not seem proper that the Southern Pacific Railroad Company shall have nothing to say in regard to the disposition of its royalty oil. \* \* \* As I have already stated, this matter has been hatched for my signature without submission to me and without consultation."

This portion of the letter shows that his real reason for refusing to sign the lease was because it had been "concocted" without consulting him and because it would remove such a large body of lands from the control of his department. The letter contains many other objections to the lease, both generally and as to minor details, but these were mere make-weights, as the chief burden of his complaint was that he had not been consulted. He seemed to fear that if he signed the lease without formal authority from the directors of his company, his action might be questioned at some later time. "Do you think", he said to Judge Cornish in his letter, "it would be wise and expedient and would it serve the purpose of protection if I were to demand action of the board of directors of the Southern Pacific Railroad Company ratifying and confirming the lease as it stands, and directing the land agent to sign the lease?"

We have already noted that when called as a witness in this case he stated that he had carefully preserved a copy of this letter and of others for his "protection". Undoubtedly he used this word in the same sense in his letter and in his testimony. His purpose was to make a "record" for his future "protection" by reporting the matter to the New York officers of his company so that the responsibility might rest with them. In his testimony, in speaking of this letter, he said, "All I wished in that case was that all of these different matters be put forth in the light in which they appeared to me and then let my superior officer take the responsibility. \* \* \* It looked to me like a very serious

thing for a man who was less than six months in as complicated a position as that is, and without any information except what he could glean, to take the responsibility for such a lease as that" (R. 1238-9).

Apparently the operating officials of the company had been insistent that the lease should be executed at once. Mr. Eberlein testified that Mr. Markham at that time pressed him to sign the lease "over and over again" and that there was a disposition to "jam" the lease through (R. 1114, 1170, 1257). On account of this urgent demand Mr. Eberlein in this letter asked Judge Cornish to telegraph him what to do, and as an assurance that he could prevent immediate action while awaiting Judge Cornish's reply he further said, "I can stave off the delivery of this document for some time yet, I think, for the reason that if the knowledge of this lease becomes public property it will probably cause us a great deal of trouble in the United States Land Office, and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil bearing". This is the portion of this letter which was quoted by the District Court as evidence of fraudulent knowledge (R. 75).

It is to be noted that he spoke in terms of conjecture merely. He said that the lands "may *hereafter* turn out to be mineral". He had no knowledge, or even belief, that they were in fact mineral lands. No such knowledge was then possible. He was merely speculating on a remote chance, which was probably far less real to him than was his strong desire to defeat the lease at any cost. This is further shown by the concluding

paragraph of the same letter where he said, "If it becomes known that we have executed a lease of lands interspersed with those already under selection by us, and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file upon the land so selected and that the government will have good ground for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease".

It is apparent from this language that the only fear he had was as to the *appearance* which would be caused by this lease and not that it would in fact indicate knowledge of oil. And this language, whether intentionally or not we do not know, made this appearance worse than it was by stating that the leased lands were "interspersed" with those in the selection, which was far from true (See Map No. 7, Appendix).

This was a confidential and intimate letter to his immediate superior, yet it gave no hint that he thought the selected lands were in fact valuable for oil. On the contrary this letter at another place calls Judge Cornish's attention to the fact that the government had examined these lands and found them not to be oil lands. And Mr. Eberlein testified, in reference to this letter, that what he feared was not any disclosure of *fact* concerning the character of these lands, but that the lease would create a dangerous *presumption*, which, though false and contrary to the facts as he knew them, might be taken by the government as an excuse for delaying or denying the patent. His prior observation

had convinced him, he said, that very little was required to induce a government land officer to deny a railroad patent (R. 1090-1, 1167-8, 1249-50).

On September 10, 1904, Mr. Eberlein wrote a similar letter to C. H. Markham (R. 1053-6). In this letter, after objecting to the lease on a variety of grounds, he said:

“In addition to this there is a very urgent reason for delaying the execution of these papers. We have selected a large body of lands interspersed with the lands to be conveyed by this lease, and which we have represented as non-mineral in character. Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented. We could not successfully resist a mineral filing after we have practically established the mineral character of the land. I would suggest delay at least until this matter of patent can be adjusted” (R. 1055-6).

The most that he said in this letter was that the lease “might establish the mineral character of the lands”. This meant only that the lease might give them a speculative or presumptive value because of propinquity. In addition to writing this letter, Mr. Eberlein testified that he had a number of talks with Mr. Markham in which he protested strongly against the making of the lease because of its possible effect on the patent application (R. 1093, 1171). It also appears that Mr. Markham sent this letter of September 10, 1904, to Mr. Dumble and that the latter replied, stating in effect that the objections were unfounded (R. 2950). If these men had been aware of anything improper in the

selection, they should at once have taken alarm and canceled or modified the lease. But they did not. Instead, on September 21 and again on October 17, 1904, Mr. Markham wrote Mr. Eberlein asking him "whether there is anything in the lease that is really objectionable" (R. 1061, 1069). This question is significant of their understanding of the real reasons which caused Mr. Eberlein to object to the lease. Mr. Kruttschnitt, who at that time was still in control of oil development for the company as the superior officer to Mr. Markham, and who then knew of Mr. Eberlein's refusal to sign the lease, testified in this connection, "He knew I had instructions to develop oil on the lands of the company and I have never been able to trace his objection to signing the lease to anything except pique because he had not been consulted and he considered himself slighted" (R. 3088).

Other letters passed between Mr. Markham and Mr. Eberlein, the former at all times urging the execution of the lease. In a letter dated October 18, 1904, Mr. Eberlein so far yielded in appearance to the insistence of the others that he said that the "whole transaction can be closed as soon as Mr. Dumble reports", referring to some corrections in descriptions that were being made by the latter (R. 1071). But Mr. Eberlein says that he had no intention to sign the lease when he wrote this letter but was merely "sparring for time until Judge Cornish had a chance to pass on it" (R. 1219). But Judge Cornish, although he encouraged Mr. Eberlein to persist in his refusal, never saw fit to otherwise interfere with Mr. Kruttschnitt's plans, although he knew

that the lease had been put into effect without Mr. Eberlein's signature (R. 1242-5). This latter act was done at once and from that time on this lease was treated in every respect as if it had been fully executed (R. 1117-18, 1132, Eberlein; 2958, 3009, 3032, Dumble; 3087-8, Kruttschnitt). Mr. Kruttschnitt testified that as the Southern Pacific Company owned every share of stock of the Southern Pacific Railroad Company he regarded the signing of the lease as necessary only as a "book-keeping" matter and therefore went ahead, since he was acting under the order of Mr. Harriman to develop oil for the company (R. 3088). This latter fact probably explains why Judge Cornish did not attempt to interfere but chose, instead, to assist Mr. Eberlein in making and preserving a "record" for their joint "protection" in the event future developments should cause Mr. Harriman to question the policy of the lease itself.

We have emphasized the conduct of Kruttschnitt, Markham and Dumble in connection with this lease for this reason. They were the persons directly concerned with the procuring of oil and oil lands for the company. If there had been a fraudulent purpose to acquire these lands in the Elk Hills for oil, they, of all persons, should have known it. If they did, their conduct was curiously inconsistent. If they were guilty, the Eberlein letters and protests must have instantly put them on their guard. They are intelligent and able men. The first two are now at the head of two of the largest railroad systems of the country, the Southern Pacific and the Illinois Central (R. 3080, 1171), while Mr. Dumble



had been state geologist in Texas for ten years before he became the chief geologist of the railroad company (R. 2897). It is not to be assumed that men of this caliber would be blind to the danger of exposure and consequent failure of the fraudulent scheme in which it is claimed they were engaged. If they had been guilty, we would expect them to have taken steps at once to avert the danger Mr. Eberlein had suggested. They could have done this readily by changing the lease so as to cut out all the lands near the Elk Hills, especially as such lands were then and are now undeveloped and of slight prospective value for oil. They also must have known that the mere *signing* of the lease was a matter of slight consequence, as an advertisement to the world of what they believed to be oil lands, compared to their visible acts of operation and control of the leased lands in the field itself. Yet, despite the protests of Mr. Eberlein, they proceeded with their operations in the name of the Kern Trading & Oil Company without secrecy of any sort (R. 2947, 2954). In fact, not the slightest change seems to have been made by Mr. Dumble and his associates in the course they had originally outlined. This is not consistent with the conduct of men instigated by a fraudulent purpose.

The only thing done by Mr. Dumble in compliance with Mr. Eberlein's desire was the letter he wrote on December 7, 1904, to W. H. Bancroft, who had succeeded C. H. Markham as general manager. In this letter he said, "In connection with our correspondence regarding the transfer of property to the Kern Trading & Oil Company, I have had a conversation with Mr. Eberlein

and it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute the lease of lands between the Southern Pacific Railroad Company and the Kern Trading & Oil Company at present" (R. 1072). Mr. Dumble testified that he sent this letter after a conversation with Mr. Eberlein about the time the letter was dated (R. 3026) and not on October 6, 1904, as is stated in the opinion of the District Court (R. 76). He said that this conversation made little impression on his mind and that he wrote this letter simply out of deference to Mr. Eberlein's insistence and because it was a matter of indifference to him at the time since the lease was in operation and his work was not being disturbed (R. 2954, 3026). If he had been conscious of anything improper in the matter of the selection of the lands in suit it is not at all likely that he would thus have put his recommendation in the permanent form of a letter addressed to a man in the same building to whom he might readily have given the caution verbally.

The real attitude of Mr. Eberlein toward this lease is shown by the fact that he refused to formally recognize that it existed even after the lands in suit had been patented (R. 1120). As late as February 6, 1907, he wrote a letter to the auditor of the railroad company *denying all knowledge* of such a lease (R. 2955). He then had the original charred lease in his possession as he had saved it from the fire of 1906 and had kept it in his own possession until he produced it in this case (R. 1099, 1177, 1261, 1272). He knew that a search was being made for a copy of this lease following the

destruction of the company's records by this fire but so great was his opposition to the lease, even after all danger was past, that he refused to disclose his copy. Therefore, after a further examination and report by Owen and Anderson, a new lease was drawn up on December 12, 1907, including the lands which are shown on Map No. 7 in the Appendix to this brief. So well was Mr. Eberlein's attitude understood at that time that this lease was signed on behalf of *both* the lessor and lessee by E. E. Calvin, who was vice-president of one and president of the other (R. 2965). And Mr. Eberlein testified that both he and Judge Cornish refused to recognize even this new lease (R. 1276, 1286).

This new lease did not include any of the lands now sued for, although at the time it was executed they had been patented for three years. It included a much larger area than the earlier lease. Owen and Anderson were told to add such lands as they thought proper without restriction (R. 2960). This appears clearly in a notation made by Mr. Dumble at the time on a preliminary list he sent to Mr. Owen and which was found in the papers of the latter after his death with his own notes as to what should be added, which did not include anything in the Elk Hills (R. 1611, 1614). Mr. Anderson testified that he and Owen worked together and that they understood that they were free to include any land they thought might be valuable for oil (R. 2412-15, 2427). He further testified that he did not include the lands now in suit in his 1907 recommendation solely because he did not consider them oil lands (R. 2724-9).

We have discussed these Eberlein letters and the incidents relating to them at much greater length than their real consequence warrants simply because they have been given a meaning and importance by the trial court and by counsel for the government out of keeping with their slight value in determining the real issue in this case. We have elsewhere discussed the total lack of *knowledge* possessed by Mr. Eberlein or anyone else in 1904 concerning possible oil in the lands sued for. Unless such knowledge existed there could have been no fraud. It therefore makes no difference what Mr. Eberlein may have *thought* or what interpretation is now sought to be put upon his words at that time. Even if he did suspect that deep drilling might disclose oil somewhere in these lands, this would not afford a single element of *fact* for the foundation of this suit, or tend to prove the allegation of the bill that these lands were *known* to be valuable for their oil contents when they were selected for patent.

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#### CONCLUSION.

This brief has been necessarily prepared without knowledge of what appears in the brief for the government. We believe, however, that we have called attention to the salient facts upon which the decision of this Court must ultimately rest. Discussion of much of the voluminous record has been omitted since it seems

to us that the controlling facts are few and clearly established. We are confident that the government has failed to prove its charges. In truth, it has offered nothing more substantial than surmises and suspicions. It certainly has not proven its case by "that class of evidence which commands respect and that amount of it which produces conviction".

The words of Mr. Justice Miller in characterizing the case made by the government in *United States v. San Jacinto Tin Company*, 125 U. S. 273, 300, so fitly describe the present case that we may adopt them as our own summary. "So far", he said, "from there being the satisfactory evidence here pointed out of a fraud against the government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as 'fraud', 'deceit' and 'imposition'. If the case stood alone upon the testimony introduced by the government it would, so far as any fraudulent purpose is concerned, do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the government, and not always by the most appropriate means; but when the testimony for the defense is considered, it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes."

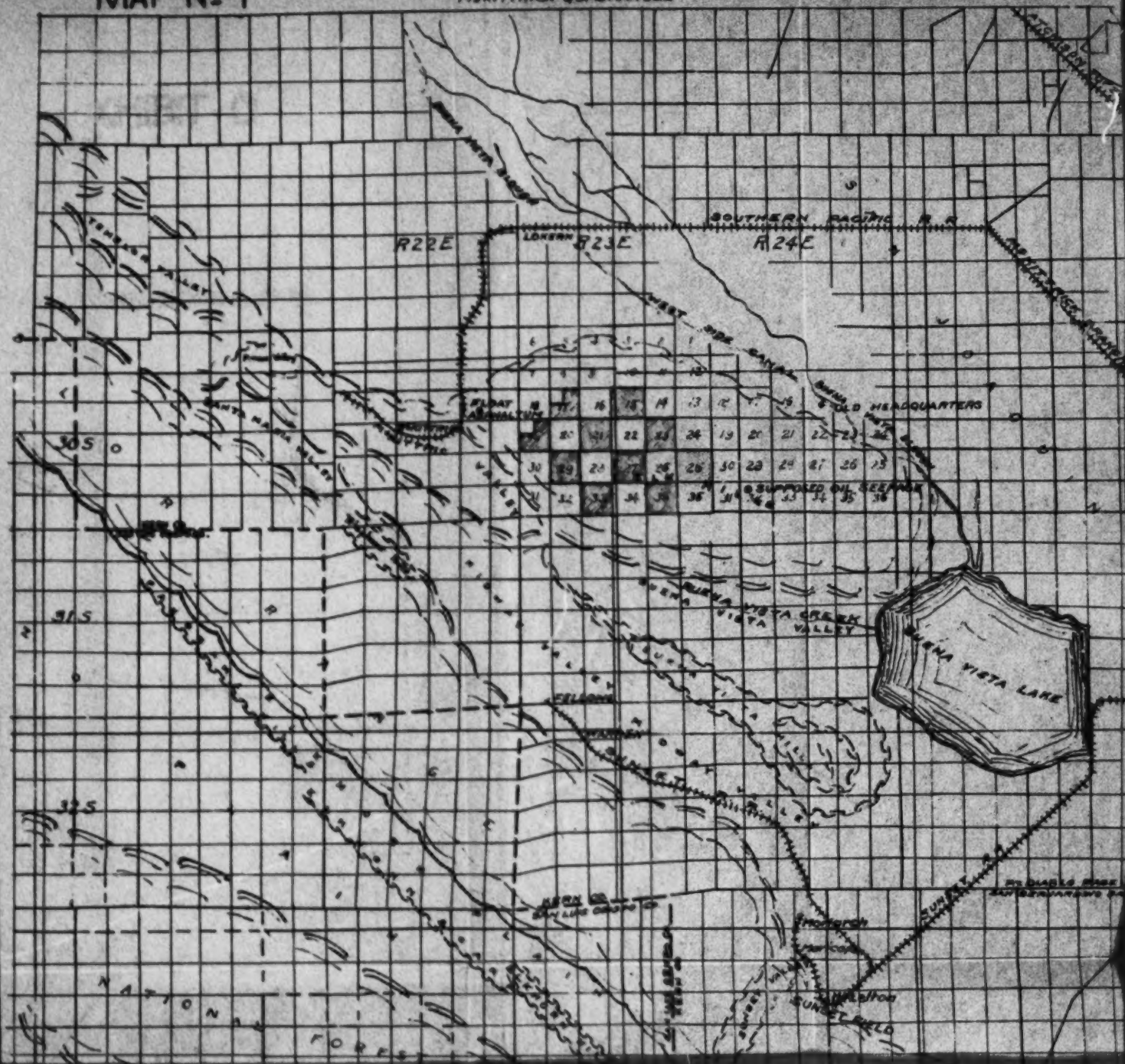
We respectfully submit that the decree of the Circuit Court of Appeals in this case should be affirmed.

February 15, 1919.

CHARLES R. LEWERS,  
*Solicitor for Appellees.*

WILLIAM F. HERRIN,  
JOSEPH P. BLAIR,  
*Of Counsel.*

Vol. 1  
HEKITTRICK QUADRANGLE





COPY OF MAIN FEATURES OF DEFENDANT'S EXHIBIT NR116

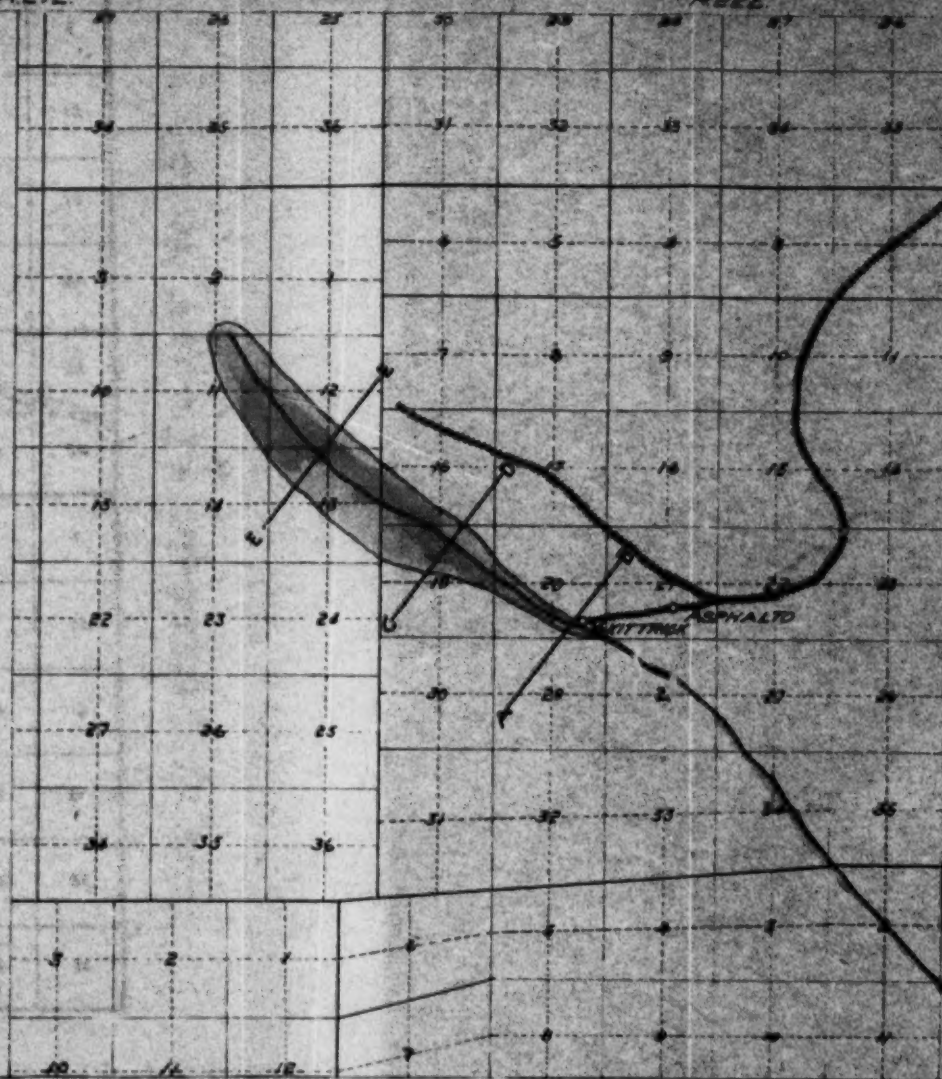
R21E

R22E

MAP No 3



Red Apex of Anticline  
Green shows what is oil  
lands in my opinion  
from present development  
J.B. Treadwell



Map received by E.T. Dumble from J.B. Treadwell in 1902 Tr. page 2903



MAP No 4

R21E.

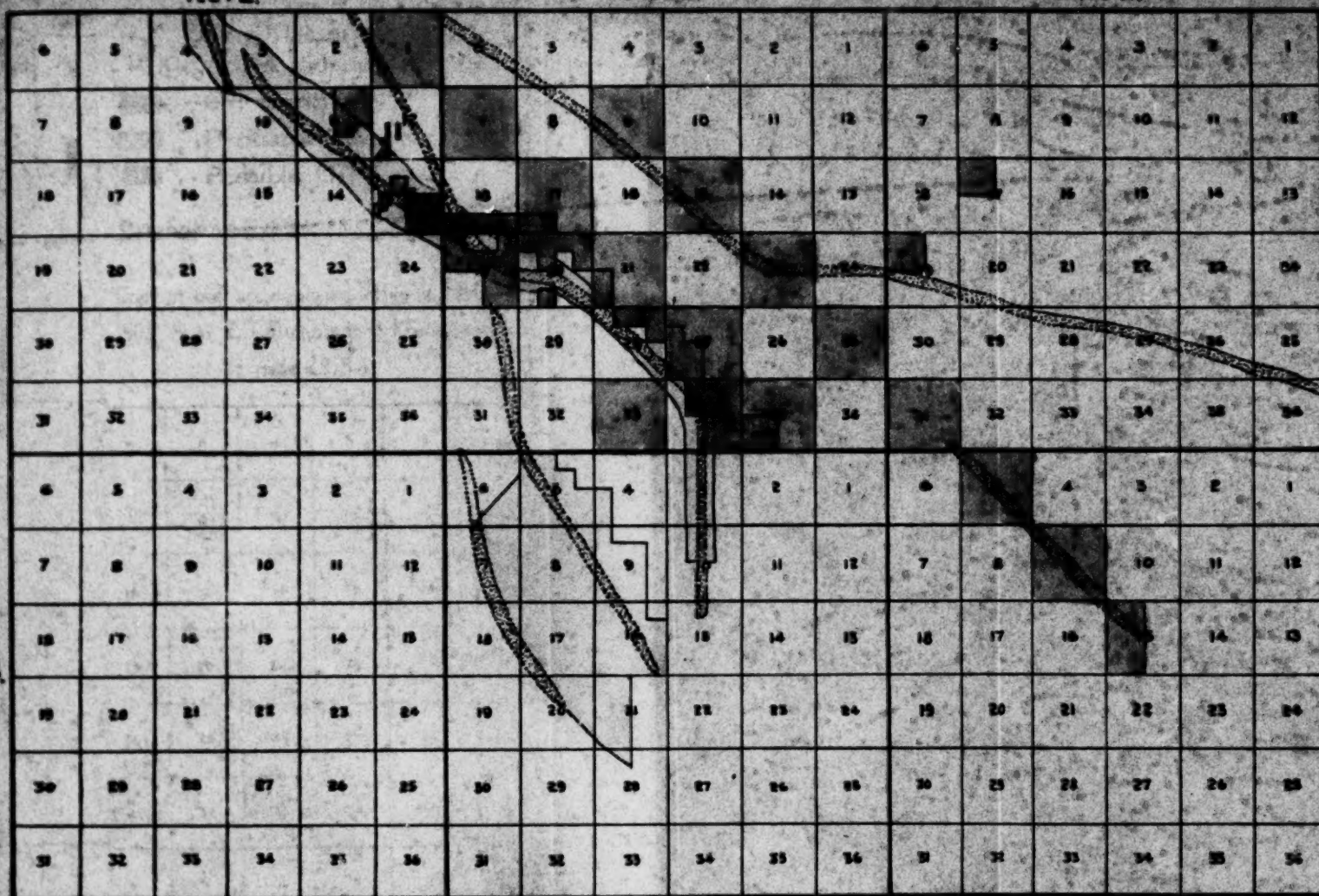
R22E.

R.23E.





T.30S.

T.31S.

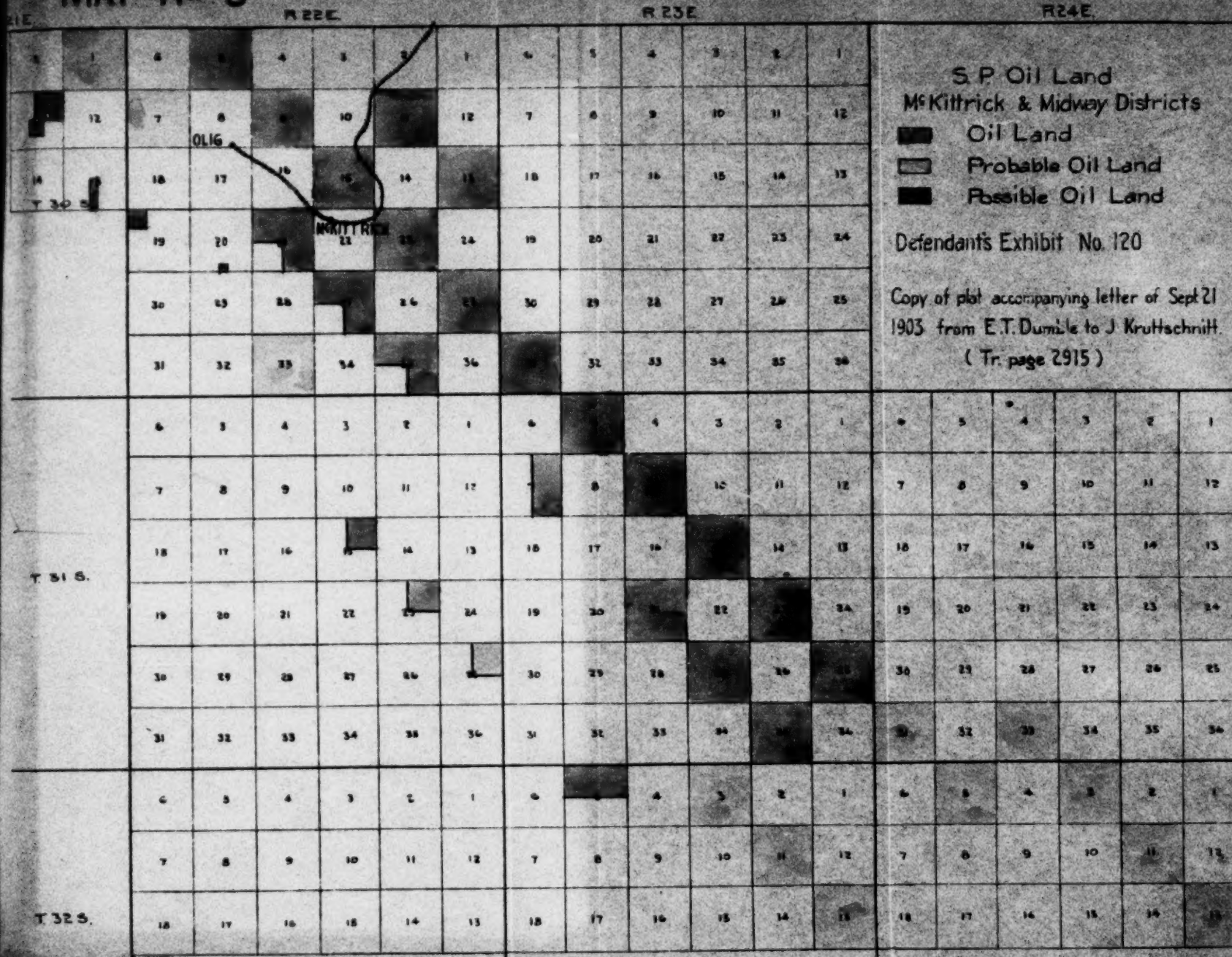
COPY OF DEFENDANT'S EXHIBIT No. 157



Map received with Owen letter of March 25, 1903  
( Tr. page 2977 )

-  Apex of Anticline
-  S.P.R.R. Lands should be reserved
-  Lands supposed to contain oil
-  Consolidated Oil Co. in which S.P.R.R. owns 1/2 int.

# MAP No 5









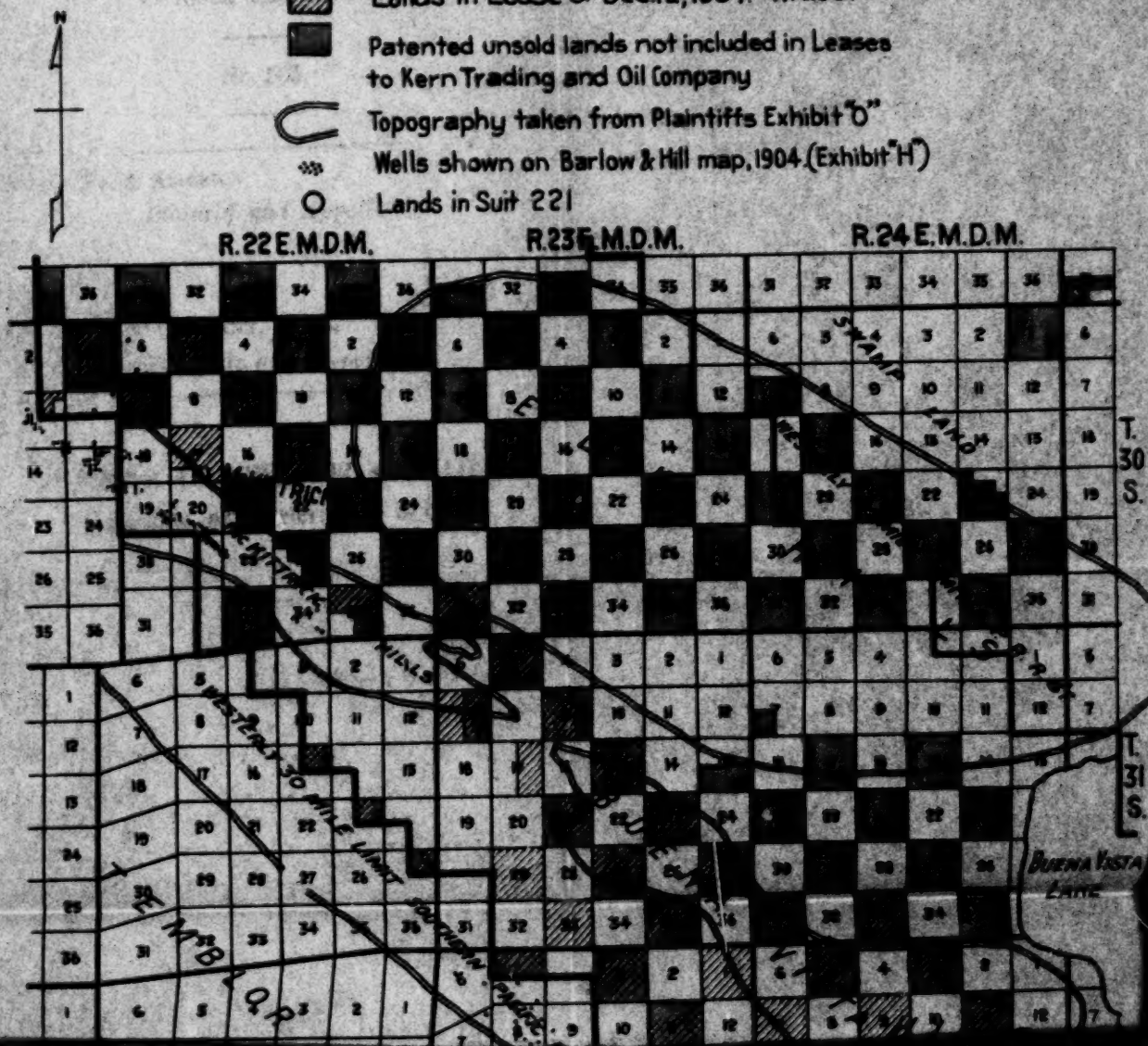


Plat showing lands in the vicinity of McKittrick  
included in Lease of S.P.R.R.Co. to K.T. & O. Co. Aug. 2, 1904  
and lands included in Renewal Lease of Dec. 12, 1907.

# MAP No 7

## LEGEND

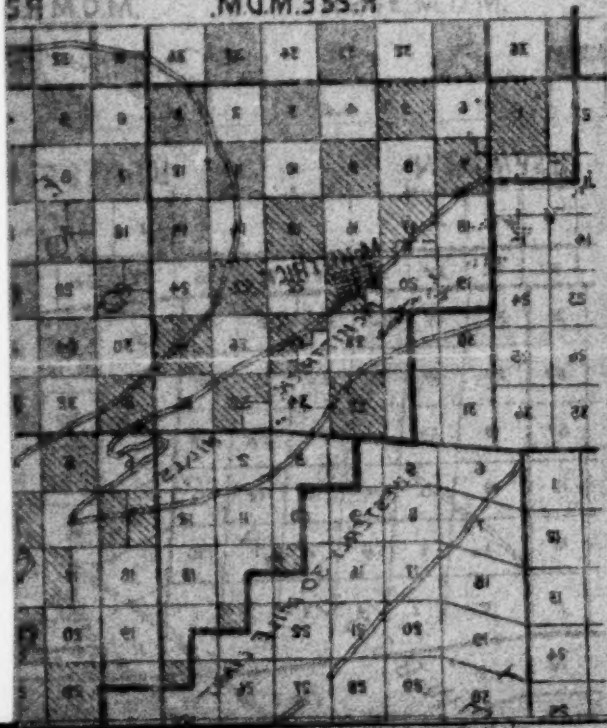
-  Lands in Lease of Aug. 2, 1904 - R. 1101-10
-  Lands in Lease of Dec. 12, 1907 - R. 2961
-  Patented unsold lands not included in Leases to Kern Trading and Oil Company
-  Topography taken from Plaintiffs Exhibit "O"
-  Wells shown on Barlow & Hill map, 1904 (Exhibit "H")
-  Lands in Suit 221



Plot showing lands in the  
included in Lease of S.R.R.  
and lands included in Ret

MAP No 7

LEGEND  
 Lands in Lease  
 Lands in Lease  
 Patented unsold  
 to Kern Trading  
 Topography taken  
 Wells shown on  
 Lands in Suit S.S.  
 R.S.E.M.D.M.



# SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1918

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No. 585

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UNITED STATES OF AMERICA,  
*Plaintiff and Appellant.*

v.

SOUTHERN PACIFIC COMPANY, et al.,  
*Defendants and Appellees.*

APPENDIX TO BRIEF FOR APPELLEES,  
Containing maps referred to in brief.

---

CHARLES R. LEWERS,  
*Solicitor for Appellees.*

WILLIAM F. HERRIN,  
JOSEPH P. BLAIR,  
*Of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

---

THE UNITED STATES OF AMERICA,  
appellant,  
v.  
THE SOUTHERN PACIFIC COMPANY  
et al.

No. 585.

---

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.*

---

## **MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

This is a suit by the United States, filed in the District Court of the United States for the Southern District of California against the Southern Pacific Company and others to cancel a patent of the United States for about 6,000 acres of land issued to the Southern Pacific Railroad Company on December 12, 1904, under authority of the act of Congress of July 27, 1866, 14 Stat. 292, and the Joint Resolution of June 28, 1870, 16 Stat. 382, No. 87.

The bill alleged that the lands were mineral in character, being particularly valuable on account of deposits of oil and petroleum therein, and not properly subject to acquisition by the Southern Pacific Railroad Company under the granting act, which excluded mineral lands, and that the company, with knowledge of these facts, at the time of making application for patent thereto concealed the true character of the lands from the Land Department. The defendants denied these averments. The value of the lands is placed at ten million dollars.

The District Court found in favor of the Government and entered its decree accordingly. Upon appeal the Circuit Court of Appeals, Judge Gilbert dissenting, reversed that decree and remanded the case with instructions to dismiss the bill. 249 Fed. 785.

The main question in the case is whether at the time of the proceedings resulting in the issuance of the patent the lands were known to be mineral in character, there being then no actual discovery of oil therein. The District Court, under the doctrine laid down in *Diamond Coal and Coke Co. v. United States*, 233 U. S. 236, held the surrounding conditions clearly such as to indicate that the lands were chiefly valuable for oil. The Circuit Court of Appeals, distinguishing the instant case from the *Diamond Coal and Coke Co.* case, held that deposits of oil differed so inherently from coal that this doctrine was inapplicable.

The case is of importance because its decision will probably materially affect several pending cases involving a large oil acreage of great value and will also guide the Land Department in cases presented to it. Moreover, the lands here involved are in Naval Petroleum Reserve No. 1, set apart for the use of the Navy.

Opposing counsel concur in this motion.

ALEX. C. KING,  
*Solicitor General.*

JANUARY, 1919.

○



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# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

UNITED STATES OF AMERICA, Appellant,	} No. 585.
v.	
SOUTHERN PACIFIC COMPANY ET AL.	

---

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.*

---

**BRIEF FOR THE UNITED STATES.**

---

## **STATEMENT.**

This is an appeal by the United States from a final decree (R. VII-26) entered May 6, 1918, by the United States Circuit Court of Appeals, Ninth Circuit, reversing a decree (R. I-81) entered August 9, 1915, by the District Court of the United States for the Southern District of California, Northern Division.

This suit was instituted by the United States on December 10, 1910, to annul and cancel patent No. 135 (R. I-19) issued to the Southern Pacific Railroad Company on December 12, 1904, embracing 6109.17 acres of land and including parts of sections 17 and 19 and all of sections 15, 21, 23, 25, 27, 29, 33 and 35 of Township 30 South, Range 23 East, Mt. Diablo Base and Meridian.

The lands in suit are in the southern half of said township 30-23, which is located in a range of hills known as the Elk Hills which are about 16 miles long and six or seven miles wide, situate in Kern County, California.

The bill of complaint charges that the patent was procured through the fraud of the Southern Pacific Railroad Company in that it selected and made application for patent for the lands in controversy supported by certain affidavits wherein it was falsely and fraudulently represented that said lands were not interdicted mineral lands and were of the character contemplated by the grant made by the Act of Congress approved July 27, 1866, 14 Stat. 292, and joint resolution No. 87 approved June 28, 1870, 16 Stat. 382; that said representations contained in said application and affidavits were false in that the said lands were and are mineral lands; that all of said representations were well known to the Railroad Company to be false; were made for the purpose of deceiving the plaintiff and inducing the issuance of the patent and that plaintiff was deceived by said false and fraudulent representations and was induced to and did rely upon the same in issuing said patent. R. I-10-13.

This grant to the Southern Pacific Railroad Company of California, of which the defendant, the Southern Pacific Railroad Company is the successor in interest, was of every alternate section of public land, not mineral, designated by odd numbers to the amount of ten alternate sections per mile on each side



of the line of the road. The Act provided that whenever any of said sections shall have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands should be selected by the Company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

The Act further provided (§ 3):

That *all mineral lands* be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal. R. I-5.

The lands lie within the indemnity limits of the grant, having been selected by the Railroad Company in lieu of lands lost within the primary limits.

The taking of testimony began in April, 1912, consumed more than a year, and was concluded in December, 1913. The testimony consisted of more than ten thousand typewritten pages.

The Railroad Company contended that petroleum was not a mineral and much evidence was offered on this phase of the case, but this position was abandoned after the decision of *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669.

The case was exhaustively argued for ten days before Judge Bean in the District Court and he handed down his opinion on June 9, 1915, holding that the Government was entitled to the relief demanded. His opinion will be found in R. I, beginning at page 71. It is not reported.

A final decree was entered in the District Court on August 9, 1915, cancelling the patent embracing the lands in controversy. R. I-81. From this decree the defendants appealed and the case was argued in the Circuit Court of Appeals on May 10, 1917, before Hon. Wm. B. Gilbert, Senior Circuit Judge, presiding, and Hon. Wm. H. Hunt, Circuit Judge, and Hon. Frank S. Dietrich, District Judge.

The opinion of the Circuit Court of Appeals written by District Judge Dietrich was filed on May 6, 1918, and will be found in R. VII, beginning at page 3. 249 Fed. 785. "Our general conclusion", the opinion states, "is that the lands were not, in 1903-4, known to be valuable for their mineral. The conditions were such only as to suggest the probability that they contained some oil, at some depth, but nothing to point persuasively to its quality, extent, or value." R. VII-25.

Gilbert, Circuit Judge, dissented.

From the decree of the Circuit Court of Appeals, entered on May 6, 1918, reversing the District Court with directions to dismiss the bill, the Government appealed.

*The selection lists and accompanying nonmineral affidavits of the railroad land agent.*

The official survey covering the lands in suit was filed in the Local Land Office on May 16, 1903 (R. VI-3761), and the Railroad Company filed its first selection list of these lands in the local Land Office on November 14, 1903. R. VI-3752. This selection list was accompanied by two affidavits of Chas. W. Eberlein, acting land agent of the Railroad Company, dated November 7, 1903. In one, Eberlein swore: "*That the said lands are vacant, unappropriated, and are not interdicted mineral or reserve lands, and are of the character contemplated by the grant.*" R. VI-3829. In the other, he swore: "*That he has caused the lands selected in said Company's list No. 89 to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.*" R. VI-3832.

The latter affidavit followed the language of the regulation of the Secretary of the Interior which had been promulgated on July 9, 1894, in reference to railroad selections, as follows:

Where the lands selected by the company are within a mineral belt, or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit, by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employees of the company, as to their mineral or agricultural character, and that, to the best of his

knowledge and belief, none of the lands returned in said list are mineral lands. 19 L. D. 21.

This selection list was rejected on November 17, 1903, by the local Land Office because the lands selected were situated in territory which had been "suspended from disposition" by the General Land Office by an order dated February 28, 1900. R. VI-3756.

The Railroad Company filed its notice of appeal from the order of rejection on December 11, 1903 (R. VI-3865), and on the same date the local Land Office forwarded the papers to the General Land Office (R. VI-3767), but the appeal was not prosecuted.

On February 11, 1904, the lands were "relieved from suspension" (R. III-1555) and the General Land Office advised the local Land Office that the application to select might be granted then if no other objection existed, and list No. 89 was returned to the local Land Office for appropriate action and the local Land Office accepted the list. R. VI-3835.

On June 20, 1904, Eberlein made an additional affidavit, which was filed in the General Land Office July 20, 1904, and which was similar to the second one above referred to filed November 14, 1903. R. III-1572.

On the 4th of August, 1904, the General Land Office, having found that there were errors in the assignment of the base lands, returned the old selection list No. 89 to the local Land Office with directions to "return the same to the company in order

that a new list may be filed, properly describing the lands," and the local Land Office, on August 10, 1904, communicated this ruling to the railroad (R. VI-3778-9), and on September 6, 1904, a new application, or selection list, was filed by the railroad in the local Land Office for the same lands but containing correct base lands. R. VI-3771-2.

This list was accompanied by affidavits of Eberlein, dated August 31, 1904, in the identical language of the two affidavits above referred to dated November 7, 1903, which accompanied the first selection list. R. VI-3847-51.

This selection list was accepted by the local Land Office on September 12, 1904, and forwarded to the General Land Office, and upon this selection list patent No. 135, for the lands in suit was issued on December 12, 1904.

The record is clear that the patent was issued upon the selection list filed on September 6, 1904, and not upon that filed in November, 1903, for the reason that the description of the lands in the patent is identical with the description in the list of September 6, 1904, but differs from that in the list of November 14, 1903 (R. VI-3775-6), and E. C. Finney, of the General Land Office, who handled this matter, so testified saying that "under the practice of the General Land Office, . . . the selection would be only effective from the time that a proper base was assigned for the tract selected as indemnity." R. III-1588-9. "In practice and legal effect the

selection becomes a valid selection only from the time that a proper base is submitted." R. III-1594.

#### ASSIGNMENT OF ERRORS.

The Government's assignment of errors is as follows:

1. Error in finding and deciding, contrary to the facts set forth in the bill of complaint and established by the evidence, that the lands embraced in the patent dated December 12, 1904, from the United States to the Southern Pacific Railroad Company, were not mineral lands excluded from the operation of the grant made by the Act of Congress approved July 27, 1866, 14 Stat. 292, and joint resolution No. 87, approved June 28, 1870, 16 Stat. 382, under which said patent was issued.

2. Error in not finding and deciding, as set forth in the bill of complaint and established by the evidence, that the patent dated December 12, 1904, from the United States to the Southern Pacific Railroad Company, was procured through fraud of the Railroad Company, in that said Company falsely represented to the Land Department of the United States that the lands embraced in said patent were nonmineral and of the character granted by the Act of Congress approved July 27, 1866, 14 Stat. 292, and joint resolution No. 87, approved June 28, 1870, 16 Stat. 382, under which said patent was issued.

3. Error in reversing the decree of the District Court of the United States for the Southern District

of California, entered August 9, 1915, with directions to dismiss the bill of complaint. R. VII-28.

#### ARGUMENT.

##### I.

**IN A SUIT TO ANNUL A PATENT AS FRAUDULENTLY COVERING MINERAL LANDS, BELIEF AS TO MINERAL CHARACTER IS ESTABLISHED BY PROOF THAT THE KNOWN CONDITIONS AT THE TIME OF THE PROCEEDINGS WHICH RESULTED IN THE PATENT WERE PLAINLY SUCH AS TO ENGENDER THE BELIEF THAT THE LANDS CONTAINED MINERAL DEPOSITS OF SUCH QUALITY AND IN SUCH QUANTITY AS WOULD RENDER THEIR EXTRACTION PROFITABLE AND JUSTIFY EXPENDITURES TO THAT END, AND THIS RULE APPLIES TO OIL LANDS.**

The ultimate question for decision is whether the Railroad Company believed, contrary to its affidavits, that the lands were valuable for oil at the time of the proceedings which resulted in the patent. Involved in this, but apart from direct evidence of such belief by responsible agents of the Company, is the preliminary question whether the known conditions at that time were plainly sufficient to engender such belief.

In *Diamond Coal Co. v. United States*, 233 U. S. 236, 239, which was a suit to annul homestead patents procured by fraudulent representations that the lands were non-mineral, the Court held:

To justify the annulment of a homestead patent as wrongfully covering mineral land, it must appear that at the time of the proceed-

ings which resulted in the patent the land was known to be valuable for mineral; that is to say, it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the findings of the land officers. If the proofs were not false then, they can not be condemned nor the good faith of the applicant impugned by reason of any subsequent change in the conditions. p. 239.

An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. p. 248.

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions. p. 249.

The case of *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, relied upon by the coal company, is essentially different from this in that there the court was dealing with a statute excepting from entry lands on which there were "mines" at the time, a matter



particularly noticed in the opinion (p. 328), while here the exception is of "mineral lands," and "lands valuable for minerals." p. 249.

The defendants contend that this principle is not applicable because the Court was dealing with coal lands, basing this contention upon the concluding paragraph of the opinion in which it is said:

Neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines. p. 249.

The Government contends that the evidence in this case shows that oil in its mode of deposition and situation in the earth is so like coal that the two minerals must be dealt with along the same lines.

Judge Bean held (R. I-77):

Oil like coal occurs in stratified forms of deposit or rather migrates into and permeates stratified deposits and follows them persistently and continuously unless interrupted by some intrusion to the end. Lands therefore may and often do become valuable for oil through adjacent disclosures and other surrounding conditions, although there has been no actual discovery within their boundaries.

And he accordingly held that the test for "coal lands" laid down in the *Diamond Coal* case was applicable to "oil lands."

The Court of Appeals held that the *Diamond Coal* case was but "remotely analogous" (R. VII-22), since coal is different from oil in that "a coal bed is fixed and unchangeable" whereas oil is "mobile" (p. 19), that a "discovery" in the sense of the general mining laws within the boundaries of the land was necessary to establish its mineral character (p. 17), and that the applicable decisions<sup>1</sup> are those which hold that a vein or lode is not shown to be "known to exist within the boundaries of a placer claim" (R. S. § 2333) by evidence of indications outside the boundaries sufficient to establish *belief* of the fact (pp. 17-19) — cases which were relied on by the Coal Company in the *Diamond Coal* case, as the brief in that case shows (p. 36), but which were there held inapplicable to a statute excluding "mineral land" from agricultural entry.

If the Court had intended to restrict the principle to coal lands, it could easily have done so by simply using the word "coal" instead of "mineral." By using this language, it clearly meant, we submit, that the principle was not restricted to the determination of coal lands but applied to other minerals unless within the terms of exclusion in the concluding paragraph of the opinion above quoted.

There is, of course, no mineral whose mode of deposition and situation in the earth is just like coal;

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<sup>1</sup> *Iron Silver Mining Co. v. Reynolds*, 124 U. S. 374; *United States v. Silver Mining Co.*, 128 U. S. 673; *Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431

but stratified forms of minerals such as coal and oil differ essentially from lode or placer deposits and Mr. Justice Van Devanter no doubt was referring to deposits of the precious metals. The evidence establishes the fact that next to coal mining, the mining of petroleum based solely upon geologic evidence is the surest. And in the opinion of the Court of Appeals in the *Diamond Coal* case (191 Fed. 786,796), concurred in by Mr. Justice Van Devanter, Judge Hook said:

Veins of precious metals are notoriously more uncertain in extent, continuity, and uniformity than deposits of coal.

(a) *The evidence shows conclusively the striking similarity of coal and oil in their mode of deposition and situation in the earth.*

A. C. Veatch in 1897 "was assistant in charge of one section of the Indiana University Geological Survey, working in Indiana." In 1898 he was a member of the Cornell University Geological Survey of the Tertiary, working in the coastal plain from New Jersey to Mississippi. 1898 to 1900 he was assistant State Geologist of Louisiana. 1900 and 1901 he was assistant in charge of areal and stratigraphic geology in Cornell University summer school of field geology. 1901 and 1902 he was geologist of Houston Oil Company, working in the Louisiana and Texas oil fields. 1902 he was appointed professor of geology in the State University of Louisiana,

and State Geologist which position he resigned to accept a position in the United States Geological Survey. He was with the United States Geological Survey from December, 1902, until 1910. 1910 and 1911 he was engaged in work in the Trinidad and Venezuela oil fields. Since his resignation from the Geological Survey he has been engaged in work as consulting geologist. While in the United States Geological Survey he was chairman of the coal land and the oil land classification boards. In 1907 President Roosevelt appointed him a special commissioner to investigate the mining laws of Australia and New Zealand. R. II-687, 688.

Mr. Veatch was the expert for the government referred to in the *Diamond Coal* case and whose geological deductions and opinions the Court adopted.

Mr. Veatch testified that he had personally examined the Elk Hills and in reference to the occurrence of oil he testified:

Where minerals occur in stratified rocks, it is frequently possible to determine with exactness their extent and value and other factors important in their appraisalment and development. That is the method which has been employed for many years by practical men in such subjects. Stratified rocks are laid down in relatively regular layers, for the most part, beneath the sea, and are to be contrasted with other rocks formed by igneous intrusions or volcanic outpourings or which have been so altered by metamorphic action as to lose

their former characteristics. The individual layers of stratified deposits can be traced for many miles, and in many cases hundreds of miles, showing to a great extent the same characteristics, and it is on this regularity or irregularity as shown by the outcrop that practical men base their conclusions and have spent great sums of money in developing minerals of the kind which occur in stratified deposits. R. II-696.

Among the most important substances which occur in stratified deposits "are coal, water, oil and phosphate. . . . They differ markedly from most deposits of ores, and entirely from veins or lodes, which are of very irregular character." R. II-697.

It is on the exposures at the surface caused by uplifting or folding or erosion that the conclusion is based.

The beds, after deposition, are folded up and eroded, and the effect of this erosion is to enable the geologist to examine the character of the rocks as fully and as carefully as he could in an enormous trench dug through the surface of the earth. Extending for many miles it forms a much more sound basis for judgment than a single development. R. II-697.

Asked if he could draw an analogy between stratified beds of oil and coal, he answered:

They both occur in stratified deposits and are subject to much the same laws; and you

can—in the case of a coal deposit, where the erosion has entirely removed the strata around a given area, you have the area arising as a hill above the surrounding region. If, in such a case, you find the coal outcropping on one side of the hill and follow that coal bed around the hill, as you can, by natural exposures, and find it goes entirely around the hill, you know absolutely that the coal underlies the hill and are justified in buying that land as coal land in the absence of any development. In a similar way, if you find a coal bed exposed on the side of a valley, dipping beneath the valley, you know that the valley is underlaid with coal, and by the change of slope of the beds you can calculate the depth of that coal bed in that area which is underlaid with coal. In the case of oil or water you can follow the sand bed or other porous bed suitable for containing them, in exactly the same way as you do the coal bed. You can determine the existence of the layer of coal, and in a similar way you can determine the existence of that porous strata in the same way you can calculate the thickness or the depth of that porous bed under different portions of the territory. You follow the same method. The presence of oil or water in the porous bed can be indicated either by springs along the outcrop, in the case of water, or seepages in the case of oil, or, failing those, their presence may be demonstrated by a well or a group of wells. Such wells or group of wells, taken in

connection, or such seepages taken in connection, with the determinal persistence of these beds and the geological structure, warrant the development of territory in which you have not drilled. It shows the presence of the substance desired under the lands. R. II-698-9.

A competent geologist, he testified, may determine by such observations the extent of an area containing deposits of coal, phosphate, oil or water, and that it is frequently done. R. II-699.

After reciting the determination by the Geological Survey of underground water basins in advance of drilling, extending from New Jersey to Mexico, and being asked in what way oil differs from water in such determination, he said:

It differs from water in this, that where water and oil are both present in the porous bed, the water tends to accumulate in the lower portions of the strata or synclines, forcing the oil into the higher portions of the folds or anticlines of the strata; and it is for this reason that it is particularly important, in a new field, to determine the position of the anticlinal features. Water and oil do not always occur in the same porous strata. R. II-700.

Being asked whether the oil value of lands not yet drilled may be determined otherwise than by the drill, he answered:

I think they can, in the same way that the coal can be demonstrated by the outcrops.

It is the same principle in every way. It has frequently been demonstrated in advance of the drilling. R. II-701.

Mr. Veatch testified that from a consideration of the conditions existing in 1904, he concluded the Elk Hills are oil lands.

He testified that—

there are a series of porous beds and associated clays which are well designed, on the one hand, to afford a reservoir for the oil, and on the other hand, to prevent undue leakage, which may be traced for many miles along the flank of the Temblor Range, the east flank, in this case, being the important one for this question. In that area there are seepages which have been there from the beginning, which extend for a distance of over fifteen miles, showing the persistence of the oil saturation in these porous layers. R. II-701.

They [those beds] are exposed on the east flank of the Temblor Range and may be followed there for a great many miles and the porous character readily determined. Now, taking this distance of seepages of fifteen miles, and which is, I may say, greater than that, but that is an area that is adjacent to this that is easily shown, it shows impregnation of oil strata extending at least seven and a half miles from a given center. Applying this distance of seven and a half miles from the outcrop, it includes Buena Vista Hills and the



Elk Hills, and the only question which could remain regarding the oil value of the territory outlined in this way would be with respect to the synclinal areas, the valley lying between the Elk Hills and Buena Vista and McKittrick Hills and the valley lying between the Buena Vista Hills and the outcrop along the front of the range. Both the Buena Vista Hills and the Elk Hills fall within the proven area from geological determinations. R. II-701-2.

They [those beds] dip, in a general way, towards the San Joaquin Valley. The general slope is interrupted by folds which are, roughly, parallel to the main fold of the axis of the Temblor Range, and, forming these folds, rise as groups of hills above the surrounding country, and their structural character is evident even to the most casual observer. . . . They are elongated domes of ideal structure for oil accumulation. R. II-702-3.

If any corroboration were needed with regard to the line of evidence outlined, it is found in the seepages in the Buena Vista Hills and in the Elk Hills; and any questions which might arise with regard to the persistence of the oil, as shown by these seepages, are conclusively set aside by a great series of wells which had been sunk prior to 1904 down the dip from these seepages, and connecting, showing that the seepages represented oil in commercial quantities. R. II-703.

On cross-examination, Mr. Veatch being asked to say in short form what he used as the basis of his conclusion that the Elk Hills are oil lands, answered:

Along the east flank of the Temblor Range there is a series of porous beds exposed, which can be traced for many miles readily. Along this outcrop or near it where there has been a slight faulting, there are seepages of oil. These seepages extend from below Sunset to North of McKittrick, showing a persistence of the oil impregnation in those porous beds. These porous beds dip to the eastward or northeastward, toward the San Joaquin Valley, and are interrupted by a number of folds. That is, the gentle slope is interrupted by a number of folds, these folds being of ideal character for oil accumulation. One of these folds is the Elk Hills. It is, broadly speaking, an elongated dome, and from the persistence of the oil along the outcrop as shown by those seepages, and that showing also corroborated by the great number of wells that have been sunk down the dip from this outcrop prior to 1904, indicates to me that the Elk Hills is very good oil land. R. II-803-4.

Q. And after you had made a careful and detailed examination of the surface, you were able to say in your own mind, were you, that you knew absolutely that underneath that dome was oil, in paying quantities?

A. No; not at all.

Q. Then what conclusion did you reach?

A. I reached the conclusion that that was to me valuable oil land, that is, it had a commercial value as oil property.

Q. What do you mean by that?

A. Because of the very great probability of oil occurring there. It is not possible to say certainly that there is oil there, that is, there is oil in commercial quantities. If there is oil in this region, it certainly occurs in that locality, and that is a place where I would certainly advise drilling and where a man would be amply justified in spending money in drilling a well. R. II-743.

Asked as to a coal outcropping around the side of a valley, Mr. Veatch testified:

I could not guarantee to any man that there would be commercial coal there, but I would say that the possibilities of developing coal were so great that it has a value expressed in dollars as coal land. I would expect that man to make a commercial success. I would advise him on that basis the same as I would on oil land. I would not guarantee that the oil land was a commercial proposition, but I would say that I believed that it was and that it would justify him in spending his money on the coal field likewise. R. II-793-4.

Mr. Veatch testified further than he was confident that he would have formed the opinion that the Elk Hills were valuable oil territory "if I had examined that territory in 1903 or '04, and I may add that any competent geologist would have reached the same conclusion at that time." R. II-819.

He further testified "there is no doubt that it is oil land" (R. II-822), and "It is conclusive in this: That I would advise a person to acquire that for oil land. I would advise him to drill it as oil land. I would not guarantee that he would get a commercial well. I would not guarantee in a case of coal that it was a commercial proposition from the outcrop." R. II-820. "Just as in a coal mine you would have to mine your coal before you knew it was commercial." R. II-823.

The value of oil land—oil land has value which has no well and which has not been proven in the sense of proving it by a well. But it is a common commercial transaction to sell land and pay an oil-land price for it where there is not a single well on the land and which is not proven in that way.

Q. Sold for speculative purposes?

A. Sold as a business proposition. R. II-825.

Asked what he meant by the term value, he answered:

A commercial value as an oil proposition. . . .

I used it as having a value as oil land—having a commercial value as an oil property. R. II-826.

Lode mining and oil mining are entirely different things. There is a much greater certainty in a petroleum proposition than there is in any lode mining, as Dr. Branner said, I agree with him perfectly where he regards coal mining and oil mining the most

certain forms of mining. As I explained the other day, I do not regard any business proposition as a certainty. R. II-827.

The evidence in the case of lode claims is entirely different from the evidence in a case of economic minerals occurring in stratified deposits. R. II-885.

Asked further on cross-examination as to the difference between coal and oil, he answered:

My experience has been, as testified, specially in stratified deposits. We are dealing with oil which occurs in a stratified deposit; coal occurs in stratified deposits; and the two things are analogous in a great many ways.

Q. But they are not analogous in this, that coal stays where it is formed and oil does not? Is not that the difference?

A. That is the difference. R. II-907.

Q. Mr. Veatch, in your opinion can the existence of oil be determined without drilling?

A. It cannot be proven in commercial quantities without drilling.

Q. Can its occurrence be determined?

A. I think it can to a reasonable degree. The matter of opinion is based upon experience and on the stratigraphic condition. The geology of the country shows, within the reasonable probability of success of a business venture, that oil occurs there [Elk Hills]. If that were not true there would be no occasion whatever for employing geologists, as the Southern Pacific Company does and a great many other Companies do. R. II-902-3.

I think there is an element of risk, as there is in all business ventures. I would not guarantee that there was oil there, but I would say that there was such a reasonable probability of it occurring there [Elk Hills] that it would justify expenditure. I would certainly advise a company to drill there and would be sure in my belief that they would get a large quantity of oil. If I didn't believe that from the geological evidence I would not advise them to drill. R. II-903.

I have stated repeatedly that no reputable geologist would guarantee the presence of oil in any place. He would simply say the conditions are such as to warrant development, and those conditions in the Elk Hills are ideal. R. II-933. I stated that I would not guarantee a man to find oil. No reputable geologist would. But the conditions were such as would justify him in spending money in acquiring the land and developing a well; that it is certainly oil land. R. II-984. The matter cannot be absolutely determined, but you can determine the degree of probability and that degree of probability is infinitely greater than it can occur in any lode mining. R. II-934.

Coal and oil occur in stratified deposits and are analogous in much the same way. R. II-932.

On re-direct examination, Mr. Veatch testified:

I think the depth [of oil] can be approximated, but it is such an approximation that it is not an exact statement.

Q. Now, there is one method of determining the extent and persistence of imbedded strati-

fications containing oil, and you mentioned only one of the many ways for determination of such, where minerals occur in stratified deposits. You were asked by counsel if you were not the pioneer in the advancement of that simple process of determination, which Mr. Lewers was kind enough to characterize as the horizon theory. Do you know whether that method has been applied in any other kind of lands in other stratifications, for example, in coal measures?

A. Yes; extensively used by geologists in classification of coal lands. R. II-936-7.

Q. Mr. Veatch, do you recognize any analogy between the determination upon geologic evidence of the extent and persistence of coal measures and that of the persistence and extent of areas carrying oil?

A. Yes; in this respect: That you determine the persistence of the porous bed which contains the oil in an analogous way. R. II-937.

*Dr. J. C. Branner* was educated as a geologist at Cornell University. In 1874 went on a geological survey of Brazil and remained there eight years. Then worked for two years in the anthracite coal region as assistant on the Pennsylvania Geological Survey. Was for several years professor of geology in the University of Indiana. From 1887 to 1892 was State geologist of Arkansas. In 1892 became professor of geology in Stanford University and has been there ever since. He testified that almost ever since he went to California in 1892 he had worked on the geology of the oil fields of California. Visited

the McKittrick field first in 1900 and had examined the lands in suit and adjoining oil territory on various occasions. R. II-1000-2.

After examining the physical condition of the eastern flank of the Coast range and the Elk Hills, and noting the many oil wells in and around McKittrick, the evidence of natural waste of oil and the oil seepages, he testified the geological structure of the Elk Hills was perfectly clear and simple. He said:

My opinion was that the Elk Hills was the most promising area for petroleum in that region in the vicinity of McKittrick. I formed the opinion that it was oil-bearing. R. II-1003.

That opinion was based on my general knowledge of the behavior of petroleum in the rocks; on my observation of the general geologic structure of the entire area that I went over. R. II-1003.

That opinion was confirmed to a considerable extent by the developments that had taken place there recently, but everything seemed to fit together; that is, the geological structure, the development of the wells, the occurrence of the oil seepages, and everything, pointed to the Elk Hills as a promising field for the finding of petroleum. R. II-1003.

I should say that if any competent geologist, observing the natural waste of oil about McKittrick and the stage of development in 1900 or a year or two subsequent, and visiting the Elk Hills and making some examination of the structural formation, failed to form an



opinion that the Elk Hills were oil in character and that there was an oil-bearing zone underneath those hills, he did not understand his business. R. II-1004.

I am familiar with the methods of quartz and gold mining and with petroleum mining, and should consider that, so far as the metal mine was concerned, the finding of traces of gold or silver on the surface of a ledge or lode did not amount to anything more than the merest suggestion, whereas in the case of the Elk Hills, I consider that the evidence is worth going ahead without any other evidences than the geology itself and disregarding any drilling or actual development in the hills themselves by man, and that evidence existed as early as 1900. R. II-1023.

There is no such uncertainty in petroleum mining as there is in quartz mining. I should say that next to coal mining, the mining of petroleum, based solely upon geologic evidences, was the surest kind of mining I know anything about. R. II-1024.

I think practical men invest money in oil territory in advance of drilling on the advice of geologists, and I regard that practice as fully justified by the results. R. II-1006.

The oil in the California fields originally developed from a series of beds that were known in geology as the Monterey shales—a series of rocks made up of the skeletons of diatoms that have accumulated in great quantities, especially about the southern end of the San Joaquin Valley. R. II-1008.

The general geology of the Elk Hills would lead me to infer that Monterey shale was under there and in great thickness. R. II-1020.

The Elk Hills are situated right about in front of the thick portions of these Monterey shales. The thickest parts, beginning up here some way north of McKittrick, come—oh, perhaps twenty miles or more, or so, northwest of McKittrick, and from there down to the vicinity of Maricopa, is the very area in which those shales have those great thicknesses, and these Buena Vista Hills and the Elk Hills lie right off towards the east, northeast, of those hills.

I would not expect the shales under the Elk Hills to be so faulted as to influence the disadvantageous accumulation of oil there. R. II-1022-3.

From my examination and knowledge of the neighboring regions, I have no reason whatever to believe that the oil-bearing sands in the Elk Hills are thin, hard or pinched out. R. II-1023.

As to the depth of oil sands, Dr. Branner testified:

There are only two ways in which that can be determined. One would be to work out the geology with great care and detail over the region—not only in the Elk Hills themselves, but in the surrounding country—to find in what horizon the oil accumulates, and then by fitting one's evidence together and studying it one might come to the conclusion in regard to the depth at which the well would reach the oil-bearing bed. The only other way would

simply be to put a well down and test it. R. II-1020.

The general structure of the Elk Hills is so favorable to the accumulation of oil in that region that if they had gone to five thousand feet and not found the oil, I should still advise a company to not give up hope of finding it. R. II-1008.

If the wells were put down without reference to the geologic structure, they might go to an enormous depth without getting oil, and yet, they may move off to one side and put down a well within a thousand or two thousand feet and get entirely different results. R. II-1008.

I should have advised anybody who might have employed me to report on those propositions, to buy the lands with a view to developing them as petroleum lands, from the surface indications and my knowledge of the surrounding conditions and of the oil formations in general. R. II-1007-8.

*Captain Frank Barrett* testified that he was 67 years old and had been in the oil business practically all his life in Pennsylvania, West Virginia, Kentucky, Ohio, Texas, California and Indiana. He brought in the first paying well in the Coalinga field. R. I-478.

He testified that he had also had experience in lode or placer and gold mining and he found that a good deal more uncertain than the oil business. That his experience extended back nearly to the time the first oil well was sunk in this country. He said that a practical oil driller could not tell where oil is as well as a scientific geologist, because a

practical driller may not know exactly where to locate his well, while a man who understands the formations and the topography of the country will locate the well and turn it over to the driller. R. I-485-6.

That he visited the Elk Hills in 1899 at the request of a gentleman named Hilbish who employed him at \$100 per day and expenses to examine township 30-23 and see if it was good oil-bearing territory (R. I-479-482), and that he made a report in writing recommending the entire south half of 30-23 as good oil-bearing territory and that he has had no reason since that time to change his opinion. R. I-481-4. That was before there was any excitement at all at Bakersfield. R. I-484.

He knew of the asphaltum outcroppings or oil springs and seepages around McKittrick. He observed a pronounced anticline in the Elk Hills. The characteristics of the formations of the Elk Hills are not at all dissimilar to the formation around McKittrick. R. I-480.

He found several seepages of oil in the Elk Hills. Took some of the outcroppings home with him and applied the chloroform test and got traces of oil. R. I-479.

*F. O. Martin*, at present mineral inspector of the General Land Office, testified that he had been engaged in the study of geological problems both practically and theoretically since 1894. Since 1910 has been engaged almost continuously in the Cali-

fornia oil fields. Had made several examinations of the lands in suit and caused to be prepared a map of township 30-23 and adjoining lands. R. I-609-610.

That he had considerable experience in the geology of oil and had had experience in quartz mining; that oil mining is more certain than lode mining. R. I-617.

On account of the oil seeps existing to the west of the lands involved in this suit and on account of the favorable structural conditions of the Elk Hills, it was clear to me from the conditions existing in 1904 that the chances of finding oil in the Elk Hills were much more favorable than the chances of finding gold in quartz prospects, judging by the outcrops, because the conditions are so dissimilar between the accumulations of oil and the appearance of valuable minerals. The conditions favor oil. R. I-619.

From the evidence existing in 1904, an ordinarily prudent man would have been justified in the expenditure of money in the Elk Hills with a reasonable expectation of ultimately developing a paying oil property. R. I-617.

*John R. Scupham* was employed by the railroad in 1865 as assistant engineer and remained as such until 1874 when he was recalled from the field and used as consulting engineer by the directors, Leland Stanford, Charles Crocker, C. P. Huntington, and others. R. I-584-5. He examined and reported on many mineral properties, and upon his advice, various coal

properties were acquired. He reported on the artesian well prospects in the San Joaquin Valley, and brought in the first artesian well in that valley. He has been in the engineering business continuously since that time, including the examination of lands for their mineral value. R. I-586.

In 1887 A. N. Towne, General Manager of the Railroad, sent him to examine the asphalt deposits west of Bakersfield. On that trip he examined the Elk Hills and reported to Towne that they were valuable oil lands. He further testified:

I said to Mr. Towne and Mr. Crocker that the oil did extend under there and it probably would be very important. I thought I knew, from the manifestations which I observed on the surface, that it did extend under there in paying quantities but I didn't know it mathematically. The surface seepage indicated most positively that there was oil in that portion in the vicinity of the seepage. It was a fresh seepage. Such indication could not be found in an exhausted oil sand. \* \* \* The other manifestations were the heavily bedded shale and sandstone in succession, and the tight clays and other manifestations of oil formations. R. I-597.

Mr. Scupham testified that he had had experience in determining the depth of water in artesian basins and the depth of coal in coal lands and that "there is a relation between the means by which you determine the depth of artesian basins and coal measures and that of oil measures or oil sands. The stratifi-

cation of a particular section would govern in each case and that is why I say they are analogous." R. I-599.

*J. A. Taff* was a witness for the Railroad Company and one of its geologists. He testified: "In making your geological examinations you determine the successions of the beds and the extent of those beds in which the oil is likely to occur, in the same way, or a similar way, that you examine lands in which coal occurs to determine the extent of the coal bed" (R. V-2768), and he admitted that "there is a certain relation between the occurrence of coal and the occurrence of oil" (R. V-2766), but contended that the rules to be applied in determining the presence or absence of oil in commercial quantities are only to a limited extent applicable in the determination of the presence or absence of coal in commercial quantities. He admitted that he, as a geologist, "in other territory and under other conditions might recommend the investment and expenditure of money with less evidence than the anticlinal structure which we have in the Elk Hills, and the fact that the well was sunk and brought in at the rate of 350 barrels per day until it was stopped by people who were operating in other territory." R. V-2875.

Thus it is seen that the evidence is convincing to sustain Judge Bean's ruling that oil in its mode of deposition and situation in the earth is so analogous to coal as to be dealt with along similar lines, and as Dr. Branner, Mr. Veatch and others said "next to coal mining, the mining of petroleum based

solely upon geologic evidence is the surest kind of mining."

It is true that the evidence on the part of the geologists in the employment of the railroad was to the effect that oil sands are not always persistent, that they may be interrupted by some intrusion or obstruction and may be "thin" or "pinched out." The Government's experts conceded that there may be the possibility of such faults, but the evidence shows that in the case of coal veins similar faults may and do occur and in the *Diamond Coal* case, the identical contention was made there that is made here.

Special emphasis [says this court], was laid upon the uncertainties incident to coal mining in the cretaceous areas of the west, by reason of the occurrence of faults, wants, thinning and the like and this, it was said, required that actual exposure of coal within the land by an outcropping at the surface, or an excavation, be accepted as the true and only test. But even such a test was largely discredited by statements that "a good outcrop at the surface may represent a want below, or a want at the surface may represent a coal below," and that in following a good discovery a fault or thinning, as well as a want, may be encountered at any moment. P. 246.

(b) *The defendants' contention is unsound that the true and only test by which to determine whether lands are oil lands is the drill and the actual production of oil in paying quantities upon the lands.*



The defendants throughout their argument and their briefs in the lower courts have reiterated the contention that the Government must fail in that it has not proven that the Railroad Company knew that the lands contained oil in paying quantities; that the Government has not proven the oil-bearing character of the land in the way their expert, Anderson, said it must be proven—not by known geological conditions—but by the actual production of oil in paying quantities, R. IV-2549.

The Government submits with great confidence that this contention is unsound; and to justify annulment of a railroad patent as wrongfully covering mineral land, it is sufficient if it appears that the known conditions at the time of the proceedings which resulted in the patent, were plainly such as to engender the belief that the land contained petroleum deposits of such quality and in such quantity as would render their extraction profitable and justify expenditure to that end, or when the known surroundings are such that practical oil men would invest in particular lands for oil mining, or advise others to do so, those lands are oil lands and excluded from entry under a railroad grant as agricultural lands, even though oil has not been actually disclosed within their limits.

If the direction and inclination of the dip and other conditions in 1903 and 1904 afforded reasonable ground for believing that the lands in controversy could be mined profitably, then they were not subject

to entry as agricultural lands. An exposure to the eye of oil upon the particular lands was not essential to give them a then present value for oil mining.

If the outcrop, the disclosures in the vicinity and the geological formation pointed with convincing force to a workable bed of merchantable oil, penetrating these lands and these conditions were open to common observation and were such as would appeal to practical men and be relied upon by them in making investments for oil mining, then these lands would be classed as oil lands and excluded from entry as agricultural lands.

The foregoing propositions are taken bodily from the opinion in the *Diamond Coal* case, merely changing the word "coal" to "oil" wherever it occurs.

That opinion further stated:

There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in such cases as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate. p. 249.

To the same effect is Judge Hook's opinion in the Circuit Court of Appeals (191 Fed. 786). He concludes his opinion with these words:

The lands were of little agricultural value, but they had a much greater value because

of the belief in their coal contents founded on evidences upon which men in the business were accustomed to rely. We think the lands were coal lands within the laws of the United States. p. 796.

So in the case at bar the Government was not required to show to an absolute certainty by actual discovery and production of oil on the lands, but it was sufficient to show known conditions which justified the belief that the lands could be mined profitably—such conditions or evidences as men in the oil business were accustomed to rely upon in investing in oil lands. Any evidence logically relevant to the issue is admissible and it is not restricted to the drilling of wells on the lands, as contended by the defendants as the only way of showing oil lands. Such a narrow construction would prevent the Acts of Congress from having any application to the valuable oil deposits of the west outside the very land on which wells have been drilled. Such a view was condemned by Judge Hook in replying to the contention of the Coal Company that the uncertainties of coal mining are so great that in the absence of actual exploration it can not be told that there is coal in any particular piece of land in quantity or quality to justify mining. Judge Hook said:

Yet, if the acts of Congress are to have application to the extensive coal deposits in the western mountainous regions outside the very land in which they outcrop and

without exploration by the Government by diamond drill at excessive, if not prohibitive cost, there must be a more liberal view than that advanced in this case by defendant. p. 795.

The defendants' contention that the Railroad Company is entitled to all oil lands except those upon which wells have been drilled prior to patent and oil produced for a sufficient period of time to demonstrate that oil exists in paying quantities, is the same contention made by the Coal Company in the *Diamond Coal* case.

The experts for the Coal Company [said the Court] proceeded largely but not entirely upon the theory that lands can not be regarded as coal lands unless coal in quantity and of quality to render its extraction profitable is actually disclosed within their boundaries. \* \* \* Special emphasis was laid upon the uncertainties incident to coal mining in the cretaceous areas of the West by reason of the occurrence of faults, wants, thinning, and the like. p. 246.

The expert for the Government proceeded upon the theory that when the known surroundings are such that practical coal men would invest in particular lands for coal mining, or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rocks with which it

was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop, and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in question and that practical coal men would regard the lands as valuable for coal and invest in them as such. He accordingly pronounced them coal lands within his acceptance of that term. p. 245.

The Court adopted the view of the Government's expert, saying:

An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. . . . The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men and be relied upon by them in making investments for coal mining. p. 248.

The Court recognized the fact that the test laid down is not infallible as all mining has "its uncertainties and hazards," but it was the only practicable and workable rule.

The uncertainties of mining, whether of coal, oil or other minerals which are found in sedimentary formations, do not prevent the application of the principle that natural and visible geologic condi-

tions may determine the mineral character of the lands without actual exposure or drilling on the lands.

In cases of this kind, two propositions are established by the *Diamond Coal* case. First; if the known conditions were plainly such as to engender the belief that the lands could be mined profitably, then they were mineral lands, secondly; the known conditions to be considered are not confined to those upon the lands in question, but disclosures and conditions on adjacent lands may determine that the lands were mineral lands.

This doctrine has been long established in the Ninth Circuit. Judge Sawyer, in *Cowell v. Lammers*, 21 Fed. 200, 206, in deciding the meaning of mineral lands in a railroad grant, held:

By the words "mineral lands" must be understood lands known to be such or which there is satisfactory reason to believe are such at the time of the grant or patent.

This is cited with approval in *Davis v. Weibbold*, 139 U. S. 507, and in *Cosmos Exploration Co. v. Oil Co.*, 104 Fed. 20, Judge Ross gave expression to the same doctrine. See also *Francoeur v. Newhouse*, 40 Fed. 618, 621.

The defendants' position is unsound in two important aspects; in that it assumes that there must be actual knowledge of the existence of oil in paying quantities and that this knowledge can only be acquired by the discovery of oil on the lands in

question resulting from the drilling of wells thereon. Their position goes to the extent of claiming that even though the Railroad Company had brought in a well prior to patent on one of the sections in suit, and the discovery of oil was such as to justify the Company in the further expenditure of time and labor in the development of the property, still the section would not be oil land and excluded from the granting act, unless the well was operated a sufficient length of time to demonstrate that it was a paying well.

This is not our construction of their position but as the court will see later in considering the subsequent development on a section adjoining the lands in suit, it was claimed below by the defendants that though a well was brought in on that section by the Associated Oil Company and produced hundreds of barrels of oil a day, yet as it was claimed it had not proven to be a paying well, therefore, the discovery showed that the land was not oil land. It was conceded by the defendants that the discovery was such as to entitle the Oil Company to a patent.

Under the mining statutes, there must be a discovery of mineral within the limits of the claim, to entitle one to a mineral patent. In *Waskey v. Hammer*, 223 U. S. 85, 90, it is held:

The mining laws, Rev. Stat. §§ 2320 and 2329, make the discovery of mineral "within the limits of the claim" a prerequisite to the location of a claim, whether lode or placer, the purpose being to reward the discoverer and to prevent the location of land not found

to be mineral. A discovery without the limits of the claim, no matter what its proximity, does not suffice.

By section 2320, R. S., "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." By section 2329 "claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." And by 29 Statutes at Large 526 (Act of February 11, 1897) "lands containing petroleum or other mineral oils, and chiefly valuable therefor" may be entered and patented "under the provisions of the laws relating to placer mining claims."

What is necessary to constitute a discovery of mineral is not prescribed by statute, but under the decisions construing the mining statutes above quoted, a finding of mineral in commercial or paying quantities is not necessary to constitute a discovery. The law is settled that the requirements of the law are met if there has been a finding of mineral within the limits of the claim and the evidence is of such a character that a person of ordinary prudence would be justified in expending his time and labor in the development of the property.

Judge Ross, in *Cascaden v. Bartolis*, 146 Fed. 739, 741, speaking for the Court of Appeals of the Ninth Circuit, in commenting on the instructions given in



that case in reference to the sufficiency of a mineral discovery, said:

While the Court in one part of these instructions did state to the jury the correct rule, that it was essential to the validity of the location under which the plaintiffs claimed that the discovery of mineral thereon was such that "an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor thereon in the development of the property," yet it also, at the same time and in the same connection, expressly and specifically instructed them that it was essential to a recovery by the plaintiffs that they should have proved with reasonable clearness that for the labor and capital expended in working the ground it would yield a reasonable profit, and that unless the jury so found, their verdict should be for the defendant. This latter specific declaration is not only not a correct statement of the law, but it is also in direct conflict with the correct rule elsewhere given in the instructions above set out.

In *Chrisman v. Miller*, 197 U. S. 313, 322, it was held:

By the Land Department this rule has been laid down, *Castle v. Womble*, 19. L.D. 455, 457: "Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

In an application for a mineral patent there must be a discovery of mineral *within the limits of the claim* of such a character that a prudent man would be justified in expending his time and labor thereon in development of the property, while in a suit by the Government to cancel a patent for fraud, it is enough if the known conditions are plainly such as to engender the belief that the lands contained mineral deposits of such a character as to justify expenditures in extracting them.

In both cases, the common element is the justification of expenditures. In the one case, this justification must be based on a discovery of mineral within the limits of the claim. In the other case, it may arise entirely out of the known conditions on adjacent lands. In neither case is it necessary to demonstrate the commercial productivity of the lands.

We submit that the contention of the defendants that there must be a discovery of oil in paying quantities, upon land before it can be excluded from the granting act as "mineral land," is without support in reason or authority.

(c) *Congress nine years before the issuance of the patent in controversy recognized the soundness and practicability of determining by geological evidence, in advance of development upon the lands, whether they are oil lands.*

By an Act approved February 26, 1895, 28 Stat. 683, Congress provided for an examination and classification of the lands within the limits of the Northern

Pacific Railroad grant under the Act of July 2, 1864, 13 Stat. 365, with reference to their mineral character, and therein made a legislative declaration of what evidence is competent to determine the character of such lands. The grant of the Northern Pacific is exactly similar and in almost the same language as the grant to the Southern Pacific.

The provision in the Act of February 26, 1895, is as follows:

Sec. 3. That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation and purchase under the provisions of the United States mining laws, and the commissioners, in making the classification hereinafter provided for, shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character. The classification herein provided for shall be by each legal subdivision, where the lands have been surveyed. If the lands examined are not surveyed, classification shall be made by tracts of such extent and designated by such natural or artificial boundaries to identify them as the Commissioners may determine. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima

facia evidence that the forty acre subdivision within which it is located is mineral land: *Provided*, That the word "mineral" where it occurs in this act, shall not be held to include iron or coal.

While the defendants now contend that the drilling of wells is the only test by which to determine the oil character of lands and deny the practicability of a resort to geological evidence, the record shows that the defendants, for several years before the patent in controversy was issued, were through their oil experts and geologists, by the use of geologic evidence alone, classifying certain of the lands as oil lands upon which there was no development and withdrawing them from sale because of their oil-bearing character. These lands were segregated and classified as oil lands by the Railroad Company upon the same principle as the Government contends the lands in controversy are shown by the known conditions to be oil lands.

Some of the lands so classified as oil lands were leased for oil production purposes to the defendant Kern Trading and Oil Company, a subsidiary of the Southern Pacific, and were adjoining and interspersed with the lands in suit which at that very time the defendants falsely represented as nonmineral lands.

*J. B. Treadwell* was the oil expert for the Southern Pacific from 1893 to 1903. He made the map, Exhibit 115, showing the lands to be withdrawn by the Railroad Company from sale. The "shaded tracts" were

reserved from sale because in or near oil territory. Treadwell testified that in selecting lands to be withdrawn from sale he "followed the system of taking the trend of the oil and located enough so as to be sure to go far enough on the dip to include all the oil that they in the future might develop and even further." R. I-437.

When Treadwell was offered as a witness for the Government in the beginning of the taking of evidence, he testified that all of his maps had been destroyed by the fire of 1906 (R. I-433), and that he did not include in his withdrawal any portion of the Elk Hills. R. I-435. He did not then know that Exhibit 115 was in existence to contradict him. This shows that he did include a large part of the Elk Hills and sections adjoining the lands in suit and lands further away from the outcrop or producing wells than these lands, and he admitted if these lands had been patented to the Railroad Company, he would have reserved them from sale. R. VI-3458.

"The system of taking the trend of the oil" and "going on the dip" that Treadwell said he followed in determining what were oil lands, was merely that of starting from the well or exposure, ascertaining the dip of the strata and determining geologically that the lands on the dip were oil-bearing, though distant many miles from the well or exposure.

*E. T. Dumble*, chief Geologist for the Southern Pacific, on September 21, 1903, wrote to Julius

Kruttschnitt, General Manager of the Southern Pacific, advising that the Kern Trading and Oil Company should acquire such lands then belonging to the Southern Pacific as "we consider valuable for oil purposes" saying:

The attached maps show these under three heads: first, oil lands proven or practically proven, colored red; very probable oil lands, colored green; probable oil lands, colored blue. Of the oil value of the first two classes there is very little doubt; the third depends in part upon the continuance of normal dips and conditions, but in addition it represents untested anticlinals which show good indications of oil. I consider that all of these lands should be under the control of this company. R. V-2912.

Here we have the defendants' chief expert determining from purely geological evidence, the oil value of the lands. Their value depended upon and was determined from a consideration of the normal dips and conditions and the untested anticlinals.

The lease which was prepared of lands to be transferred to the Kern Trading and Oil Company, included section 31 of township 30-23 in which the lands in suit are situated, section 5 of 31-23 and section 25 of 30-22 adjoining the lands in suit. R. II-1106. These lands contained no wells or exposures, yet they were classified as oil-bearing lands and transferred to the company for oil production purposes, it being the "fuel department" of the Southern Pacific. Their value as oil lands was determined solely from

geologic evidence, by following the dip of the strata from producing wells or oil exposures and assuming the continuation and persistence of the oil sands. This was the method the Railroad Company resorted to prior to the patent in the practical operation of their oil production business.

*Josiah Owen* began his geological work on the West Side oil fields in the San Joaquin Valley in 1902. He was placed by Dumble directly in charge of the field work, and on March 25, 1903, he made a full report to Dumble. R. III-1615.

In reporting on the McKittrick oil field he said:

There is but one oil horizon in this field.  
 . . . In the direction of Midway I find that the McKittrick fold flattens out in the valley, but other hills further on in the same direction would indicate that it may extend to near the Kern Lake. The Midway oil sands belong to the same horizon as the McKittrick oil sands. R. III-1617.

I find that there is but the one oil sand and I believe it will be possible to trace the same horizon to the Kern River fields. R. III-1620.

The lands in suit are between McKittrick and the Kern River Field. They are four miles east of McKittrick, while the Kern River field is about twenty-five miles east of the lands in suit.

So in 1903 we have the field geologist of the railroad reaching the conclusion that the oil horizon or sands outcropping at McKittrick persisted and continued under the lands in suit and to the Kern River field twenty-five miles further east.

Similarly in the *Diamond Coal* case it was conceded "that the coal horizon—meaning the coal bearing strata shown at the outcrop, but not necessarily the coal—passed through the lands in controversy." p. 246.

From the foregoing evidence, Judge Bean (R. I-77) was fully justified in finding that "lands therefore may and often do become valuable for oil through adjacent disclosures and other surrounding conditions, although there has been no actual discovery within their boundaries," and in determining whether the lands in suit were known to be valuable for oil, he was not in error in applying the test laid down in the *Diamond Coal* case, because of the similarity of oil to coal in its mode of deposition and situation in the earth.

## II.

### **A SUIT BROUGHT BY THE UNITED STATES TO CANCEL A PATENT FOR FRAUD STANDS UPON A DIFFERENT PLANE FROM THE ORDINARY PRIVATE SUIT TO RECOVER REAL ESTATE.**

In *Causey v. United States*, 240 U. S. 399, 402, which was a suit to cancel a patent for fraud, the Court said:

These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And



when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it.

In *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409, Mr. Justice Van Devanter said:

As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it, as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it.

In *United States v. Minor*, 114 U. S. 233, 240, which was a suit to cancel a patent for fraud, the court points out the reasons why the Government in this class of cases should not be held to the same diligence in guarding against fraud as a private owner of real estate. The Government owns millions and millions of acres of land, each land district often includes 20,000 square miles or more, in which there are only two officers and they cannot visit the lands but are compelled to rely upon the sworn proofs

furnished by the claimant, who has it all his own way, in the absence of any contesting claimant; there is no adversary proceeding whatever.

The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant.

When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced. p. 241.

### III.

#### **A REPRESENTATION RECKLESSLY MADE WITHOUT KNOWLEDGE OF ITS TRUTH, BUT WHICH IS IN REALITY FALSE, IS A FRAUDULENT REPRESENTATION.**

In *Smith v. Richards*, 13 Pet. 26, 36, this court held that—

Whether the party thus misrepresenting a fact knew it to be false or made the assertion without knowing whether it were true or false is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.

In *Cooper v. Schlesinger*, 111 U. S. 148, 155, the Court held that "a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule."

In *Lehigh Zinc and Iron Company v. Bamford*, 150 U. S. 665, 673, the Court, in an action at law, approved the following instructions:

A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them as if he had actual knowledge of their falsity.

In *Wecker v. National Enameling Co.*, 204 U. S. 176, 185, it is held that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach."

In *Mullan v. United States*, 118 U. S. 271, 277, which was a suit to annul a patent for fraud, the court said if the defendants were ignorant of the mineral character of the land "it was because they willfully shut their eyes to what was going on around them, and purposely kept themselves in ignorance of notorious facts."

*The duty was incumbent upon the Railroad Company to examine the lands to determine their mineral or agricultural character before filing a selection list.*

The duty devolved upon the Railroad Company to ascertain so far as it could by reasonable investigation and examination, the true character of all lands which it selected for patent. This duty arose out of the relationship of the railroad to the Government by reason of the exception of mineral lands (other than coal and iron) from the operation of the granting act and by virtue of the regulation of the Land Department promulgated under congressional authority, requiring that an affidavit of the land agent should accompany the selection list "setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employees of the Company as to their mineral or agricultural character," and also by reason of the *ex parte* nature of the proceedings.

The investigation which the Railroad Company was required to make was an investigation to ascertain the mineral character of the land. It was the ascertainment of a fact which involved the exercise of science and the application of expert knowledge and could not be done by non-experts or unscientific men. It was the determination of the mineral or nonmineral character of the land, a matter peculiarly in the province of experts in this branch of the science, and men especially trained in the science of geology and experienced in oil mining. At the time the selection lists were filed, the railroad maintained a geological department, with an experienced corps of oil experts, with E. T. Dumble at their head, yet the evidence

shows that there was no cooperation whatever between the geological department and the land department of the railroad and while these experts were making extensive geological examinations of the lands in this territory to determine their oil character, the information acquired by them was withheld from Eberlein, the land agent, and he testified that he didn't even meet Dumble, the head of the geological department until 1904, about a year after he became land agent, and that the only information he had about the lands was from G. A. Stone, his assistant, who was not an expert but had been a land grader, that is, he graded lands as to their agricultural value. R. II-1158.

Stone testified that he made no examination of the lands for the purpose of making the selection in question but acted upon the general knowledge which he had of the country. R. II-1088.

The opinion of the Circuit Court of Appeals stated that:

Eberlein is to be held chargeable with knowledge of all the conditions which such careful examination, if made, would have disclosed . . . Everything that was known to the Company's geologists and other agents or employees . . . must be imputed to Eberlein, its responsible agent and representative. R. VII-4-5.

## IV.

**FINDINGS OF FACT OF DISTRICT JUDGE BEAN.**

The Government contends that the findings of fact of Judge Bean who tried the case in the District Court are abundantly supported by the testimony and as he made specific findings covering all of the material phases of the case, a consideration of his findings is deemed the clearest way to present the controversy to this Court. His findings are in Volume 1, pages 72 to 79.

- (1) **THE LANDS WERE IN A KNOWN AND WELL-RECOGNIZED OIL DISTRICT AND WITHDRAWN FROM ENTRY BECAUSE OF THEIR PROBABLE OIL CHARACTER.**

Judge Bean's first finding of facts is as follows:

- (1) *The lands in controversy were at the time of the proceedings resulting in the patent within a known and well recognized oil district and had been previously returned by the U. S. Surveyor as oil bearing lands, and at the time the selection list was first filed were within a previous withdrawal order of the Department because of their probable oil character. R. I-72.*

This finding is fully supported by the evidence. The official survey of township 30-23 embracing the lands in suit, made in 1901, set forth that:

This township is situated within what is known as the Midway Mineral District which is the name given to a district within which many successful oil wells have been developed. To the northwest is what is known as the McKittrick District, the center of which is

about Sec. 18, T. 30 S., R. 22 E. To the southeast is what is known as the Sunset District, the center of which is about Sec. 7, T. 11 N., R. 23 W., and the Midway District is on the line of oil developments between the two.

The surface of the ground in T. 30 S., R. 23 E., from the southeast corner running northwesterly shows a geological formation with asphaltum exudations, that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits.

The land I have surveyed being more valuable for mineral than for agricultural purposes, I return the following sections as mineral land.

Then follows a list of lands including all the land in suit. R. II-686.

The plat of this survey was approved by the U. S. Surveyor General's office for California, August 1, 1902, which plat is plaintiff's Exhibit "E." R. I-107. This was filed in the local Land Office on May 16, 1903, and is entitled "Mineral land (in Midway Min'l District)." R. VI-3761.

On February 28, 1900, the lands in suit were withdrawn by the Government from entry because of their probable oil character and this withdrawal order was well known to the railroad officials (R. III-1476), and was in full force and effect when the first selection list for these lands was filed November, 1903. It was not revoked until February, 1904, upon the application of the Railroad Company. R. III-1544.

The withdrawal order of February 28, 1900, is in volume III, p. 1524.

Not only were the lands withdrawn from entry by the Government because of their probable oil character, but prior to the filing of the first selection list the Railroad Company through its oil expert, J. B. Treadwell, had withdrawn from sale, because of their probable oil bearing character, the lands in this township which had been patented to the Railroad Company and adjoining the lands in suit.

The lands thus withdrawn by the Railroad Company included 23 sections or parts of sections in the Elk Hills, including all of the lands in township 30-23 patented to the Railroad Company, and Treadwell testified that the only reason he did not reserve the lands in suit was because he did not know they had been surveyed.

Treadwell prepared for the Railroad Company a map dated September 17, 1902, which is exhibit 115, on which he shaded the surveyed sections that he regarded as oil lands because in or near oil territory. R. V-3423.

"I did not shade," said he, "the oil lands which were not surveyed, because they were unsurveyed," and he said that he believed at the time he made his map that the lands in suit were unsurveyed. R. VI-3458-9. The survey was not filed in the local Land Office until May 16, 1903. R. VI-3761.

E. T. Dumble, defendants' geologist who succeeded Treadwell, admitted that the shaded sections



"completely enclosed on the north, the northwest and the south and the west, the lands in this suit" and that they were the lands which in 1902 the railroad reserved from sale because they were in or near oil territory. R. V-3003.

These withdrawals by the Railroad Company included every section in township 30-23 and 30-24, which the railroad owned. R. V-3002-4.

When Treadwell first testified in April, 1912, he stated that he made no withdrawal or recommendation for withdrawal of any sections in the Elk Hills, but when the map which he prepared was finally produced, the falsity of his testimony was clear, for his map shows that he withdrew from sale every section of land in the Elk Hills which at that time appeared to have been surveyed and excluded only lands in the Elk Hills which were at that time either unsurveyed or unpatented to the railroad or which he believed were unsurveyed.

It will appear hereafter that the Railroad Company in 1903 decided to segregate its oil lands from its agricultural lands and to convey them to a company for the purpose of developing oil and to this end the geological experts of the Company made up a list of the proven and probable oil lands owned by the Company, to be conveyed to the Kern Trading and Oil Company, which had been organized as the oil development company of the railroad. This

lease was presented to Eberlein, the land agent, in August, 1904, to sign on behalf of the railroad but when he found the list included lands adjoining and interspersed with those he had selected for patent he declined to sign it saying "we practically fix the mineral status of the land [selected for patent] by this lease." R. II-1079. This list of lands shows that the railroad experts recognized the lands in suit as within the oil district.

Again when Eberlein was endeavoring to get the patent in suit, he, on December 10, 1903, wrote to D. A. Chambers, Washington (D. C.), attorney for the railroad, as follows: "I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it." R. III-1577.

The Court of Appeals, referring to the withdrawal order of February 28, 1900, stated that "in our view this order was intended to withdraw lands from agricultural entry only, and it was so generally understood." R. VII-7. The court also said that "the question is perhaps of but slight importance," but it seems to have attached importance to "the total want of oil land entries, notwithstanding suspension from agricultural entries."

We think the court was in error in this as the order is not restricted to agricultural entries, but in terms "suspended from disposition until further orders," the designated lands, and E. C. Finney, who prepared

the order and also the letters of December 10, 1903, and February 11, 1904, referred to in the opinion testified that it was intended to withdraw the lands from all forms of entry and it was so understood in the General Land Office. Finney testified that the lands were suspended "from all forms of disposition. No entry or selection could be allowed during the pendency of the order." R. III-1591.

Finney further testified: The effect given the order of February 28, 1900, "by myself and other employees of the general land office, was it suspended from all disposition the lands described, and that no filings or selections of any kind could be properly received during its pendency, that no mineral entry for petroleum could be made." R. III-1582.

The evidence also shows that some of the mineral locators in this region did not develop their locations because they understood the withdrawal order would prevent them from getting a patent. R. I-125, 503, 510.

All of the "Petroleum Withdrawals and Restorations affecting the Public Domain" have been collected and published in Bulletin 623 of the United States Geological Survey, issued in 1917. The withdrawal in question there appears on page 61 along with six others in identical form, and immediately following are five others in which the form is: "Suspend from disposition under agricultural laws." This difference of expression signifies a purpose to

suspend from all forms of disposition in the former class, including the withdrawal in question, as Finney testified, and to suspend only from disposition under the agricultural laws in the other class where that alone was intended. The result is that the absence of oil entries during the period of suspension, which seemed important to the Court of Appeals as tending to show that the land was not regarded as mineral by prospectors, is without significance.

**(2) THE LANDS ARE OF NO VALUE FOR AGRICULTURAL PURPOSES.**

Judge Bean's second finding of fact is as follows:

*(2) They are rough broken, arid lands, of no substantial value for agricultural purposes or any other purpose than their oil contents. R. I-72.*

The above finding is amply supported by the testimony of the following witnesses and indeed there is no evidence to the contrary:

B. K. Lee, R. I-277; S. P. Wible, R. I-324; Frank Barrett, R. I-481; J. I. Wagy, R. I-248; W. H. McKittrick, R. I-539; Chas. W. Lamont, R. I-582; F. O. Martin, R. I-615; S. G. Drouillard, R. I-117; F. J. Sarnow, R. I-165, 173, 181; J. W. Kaerth, R. I-418; H. P. Dover, R. I-462; Colon F. Whittier, R. I-475; N. C. Farnum, R. I-508; Parker Barrett, R. I-526; L. D. Bell, defendants' witness, R. III-1805; Samuel Shannon, defendants' witness, R. IV-2143.

Some of the witnesses stated that in a good season there would be some grass for grazing in the spring, and other witnesses stated that the land had no value even for grazing.

**(3). EBERLEIN'S AFFIDAVITS THAT HE HAD CAUSED THE LANDS TO BE CAREFULLY EXAMINED WERE FALSE.**

Judge Bean's third finding of fact is as follows:

*(3) The statement in the affidavits of Eberlein that he has caused the lands to be carefully examined by the agents and employees of the Company as to their mineral or agricultural character was and is untrue.*  
R. I-72.

In June, 1903, C. W. Eberlein went to San Francisco to take up the matter of the reorganization of the three land grants of the Southern Pacific and on August 3, 1903, he took charge as acting land agent of its land department and his formal appointment was dated September 2, 1903. R. II-1037-8.

The affidavits accompanying the first selection list were filed November 14, 1903. Eberlein had never seen the lands and knew nothing whatever about them personally. He testified that before making the non-mineral affidavit he did not send any one over the lands to examine them and ascertain their character; that he relied upon Geo. A. Stone, but Stone made no special trip to ascertain the mineral or agricultural character of the lands. R. II-1088.

*Geo. A. Stone* testified that he was Eberlein's assistant and supervised the preparation of selection list 89 under Eberlein's direction.

I made no examination of the lands in suit, myself, for the purposes of selecting them. Such knowledge as I had of the lands was general in character from my general knowledge of the country. R. II-1029.

The lands were placed in the list at the suggestion of E. T. Dumble, who was consulting geologist of the Southern Pacific at the time. R. II-1028-9.

Stone further testified:

I regarded the selection of these lands as irregular. Mr. Dumble, as the geologist, I thought pressed the selection for reasons best known to himself. I supposed, as geologist, he thought they were oil lands. He pressed the selection of this land probably within thirty days prior to the list in 1903, not earlier than September or later than November. R. II-1030.

Stone was a pensioner of the Southern Pacific at the time he testified and as soon as he was subpoenaed he went to see the railroad attorney (showing that he was not unfriendly to the railroad) and told him that the list was made up at the suggestion of Dumble. R. II-1030.

Judge Bean in his opinion on this phase of the case said that the—

insistence of the defendant throughout the case has been that no examination of the lands to

ascertain their mineral contents had been made by any agent or employee prior to the issuance of the patents, although they had for a year or more maintained a corps of expert oil geologists who were actively engaged in examining and classifying lands in the vicinity for the purpose of ascertaining their character. R. I-73.

The corps of expert oil geologists referred to were J. B. Treadwell, E. T. Dumble, Josiah Owen and F. M. Anderson whose activities in the oil fields began in 1899 and continued to the date of the patent in 1904 and will be referred to at length in the progress of this brief.

*E. T. Dumble testified:*

The lands in 30-23, which are the subject of this suit, were not examined geologically to my knowledge prior to the selection thereof in the fall of 1903. R. V-2997.

Eberlein testified that there was no co-operation between the land department and the geological department of the Railroad Company, and that when he learned, in the fall of 1904, that Dumble and his assistants were examining unpatented lands, he protested. R. II-1091-3.

It is inconceivable, we submit, that Eberlein in good faith could have made the affidavit in November, 1903, that he had caused the lands to be carefully examined by the employees of the company as

to their mineral character and that they were non-mineral lands, when he admits that he had not caused them to be examined by any one, but relied upon Stone's general information and he knew that Stone was not a geologist and not in any way qualified, if he had examined the lands, to determine as to their mineral character and when he knew at that time that the company maintained a geological department, with an experienced corps of geologists and oil experts.

Not only did he not call on any of these experts to make any examination of the lands before making the non-mineral affidavits, but the record shows that when he learned Dumble and his assistant geologists were in fact examining unpatented lands, he objected and protested, because it might charge him with knowledge of their oil character and this knowledge he did not wish to acquire. R. II-1091.

Here is what Eberlein wrote:

The New York Office has forbidden the giving out of any more printed lists of lands because of the unsatisfactory condition of our titles which must not be disclosed. The examination of our S. P. lands, not yet patented, by our oil experts must be stopped as information that they may obtain or give as to mineral character prior to patent will forever prevent our getting titles. . . . Mr. Dumble and his men should not be furnished by us with any data whatever except as to



*patented* lands. For reasons above given such information will be embarrassing to them and to us and may make them witnesses against this company in mineral contests hereafter. R. II-1095.

While this letter was written in 1908, Eberlein testified that it was but a continuation of the protests which he began to make in September, 1904, just at the time he filed the non-mineral affidavits upon which the patent in suit was issued. R. II-1092.

Eberlein was asked this question in reference to his statement in the above letter that the examination of unpatented lands must be stopped: "Was that statement a continuation by you of the accustomed protesting which you said started as soon as they offered the lease to you?" He answered: "Oh, yes; that is simply the same old thing, only we were suffering a great deal more from the activity of Mr. Dumble at that time—his interference almost every day." R. II-1098.

Asked why he underscored the word "patented" in the last paragraph in the above letter, he answered:

That is axiomatic in this connection. Mr. Dumble should certainly have nothing to do with any lands except such as were patented. If he did, it was simply—we had no control over Dumble and didn't know what he was doing and no means of finding what he was doing. R. II-1099.

He pointed out in 1904 to General Manager Markham that these examinations "were charging the company with notice." R. II-1093.

In an effort to convince the Court below that Eberlein's affidavits were not made with any fraudulent purpose, it is stated in defendants' brief that "whether or not Stone's examination was sufficient is not important; nor is the fact important that Eberlein did not have these lands examined by geologists then in the employ of another department of the company. These men were not subject to his orders."

There is no evidence that Eberlein made any request to use the geologists of the company, but on the contrary, he testified that when he learned they were examining unpatented lands which he was about to select, he protested and insisted that their examinations should stop because in that way the Company would acquire knowledge of the true mineral character of the lands and in any contests in the Land Office they would be witnesses against the Company. The fallacy of defendants' argument is so transparent that further comment is deemed unnecessary.

"Moreover," said defendants in their brief below, "there is no showing of any circumstances suggesting to him [Eberlein] that such an examination (by geologists) was required."

What further showing of circumstances indicating that such an examination was required could there be than the following? First, his duty in the premises under the granting act giving the Railroad only non-mineral lands and requiring him to select the non-mineral, under rules promulgated by the Secretary of the Interior, which required him to have them carefully examined as to their mineral or agricultural value. Second, the knowledge that the lands had been suspended from disposition because of their probable oil character and were in the oil district. Third, the knowledge that the selected lands adjoined the proven oil territory and that the railroad company was proposing to transfer to the Kern Trading and Oil Company, its oil development company for oil production purposes, its lands adjoining and interspersed with those he was undertaking to have patented and his refusal to execute this lease because it would fix their mineral status.

Eberlein could blindly go ahead, shut his eyes to these known conditions and pregnant circumstances, swear that he had caused the lands to be carefully examined, which he knew to be false, and yet it is seriously contended that such conduct does not indicate bad faith and that Eberlein had no just reasons for believing the lands in suit were oil lands.

In attempting to excuse Eberlein's failure to have the lands examined before selection and in an effort

to minimize the force and effect of his sworn statement that he had caused them to be carefully examined, the defendants in their brief filed in the Circuit Court of Appeals say "he had no reason to do so." He knew the regulation of the Department required him to have them carefully examined. What better reason could be suggested? Again counsel urged as an excuse for Eberlein not having these lands examined that "they were far removed from producing oil territory." Eberlein wrote to Chambers on December 10, 1903, that the reason he was anxious to get them patented was because "they adjoin the oil territory." R. III-1578. And he knew they were adjacent to and interspersed with lands owned by the company which the oil experts had classified as oil lands, to be turned over to an oil development company for the purposes of producing oil to be used as fuel for the railroad locomotives.

An attempt was made by the Railroad Company to excuse Eberlein's failure to have the lands examined because the Government had them examined by Ryan, but the inception of the fraudulent purpose to acquire these lands was when Eberlein made and filed his first set of nonmineral affidavits in November, 1903, and this was before Ryan's examination. Ryan was not instructed to examine these lands until December 10, 1903, and he made his superficial examination in January, 1904. So when

Eberlein made his first false and fraudulent affidavit, the lands had not then been examined by Ryan, and the same motive which actuated him in swearing falsely prior to Ryan's examination actuated him in swearing falsely in the affidavits filed subsequent thereto, and besides, between the time of filing the first set of affidavits in November, 1903, and the second set in September, 1904, and up to the issuance of the patent on December 12, 1904, many circumstances had come to Eberlein's attention which must have convinced him of the oil value of the lands for which he was attempting to secure a patent as agricultural lands.

Before and during the period of more than a year while the proceedings, which resulted in the patent in question were pending, the only thing Eberlein did in reference to the lands in suit was to inquire of his assistant, Stone, at the time he made the first affidavit in November, 1903, as to the character of the land. Here is what Eberlein said he did: "Just a general inquiry, when I made the affidavit as to whether there was any of it mineral." He was not sure Stone informed him that he had been over the ground but it was his understanding that Stone was familiar with it. R. II-1158.

The court was compelled to find that Eberlein's statement that he had caused the lands to be carefully examined as to their mineral character was untrue.

**(4) THE DOCUMENTARY EVIDENCE AND EBERLEIN'S CORRESPONDENCE SHOW THAT THE RAILROAD OFFICIALS KNEW THAT THE LANDS WERE OIL BEARING.**

Judge Bean's fourth finding of fact is as follows:

*(4) I think it clearly appears from the documentary evidence in the case, and particularly from the correspondence from Eberlein's files (a portion of which was kept separate from the general files of the office and guarded with the utmost secrecy until compelled to be produced on this hearing) that at the time the selections were made and the patent issued, the officers of the company in charge of the matter were conscious that the lands were, if not actual, at least probable oil bearing, and that the selections were made and strenuously urged to patent for that reason, and not because of their agricultural value. R. I-73.*

Judge Bean briefly reviews the evidence upon which this finding is based. As it so conclusively establishes the fraudulent purpose of the responsible officials of the railroad and is so pregnant of their conscious wrong doing and of their purpose to secure these lands because of their mineral character, a more extended examination is thought advisable.

J. B. Treadwell was the oil expert of the Railroad Company until March 1, 1903, and in September, 1902, made his withdrawal map, Exhibit 115, showing the lands of the company to be reserved from sale and both E. T. Dumble and Josiah Owen, railroad geologists, were furnished this map in 1902. R. V-2901-2.

In November, 1902, E. T. Dumble accompanied J. B. Treadwell to the West Side oil fields to inspect the oil properties and reported to Julius Kruttschnitt, Vice-President and General Manager of the railroad and in charge of its oil matters on the Pacific Coast, under date of December 4, 1902, giving his views of the extent of the oil lands in the San Joaquin Valley and concluded by saying:

I propose to take up their examination in a systematic way during the coming year in order to determine as far as can be done from surface indications and geological structure where oil is to be expected in this region with especial reference to deposits in our own lands. So far as I can judge from a trip I have just made over this territory, this work promises results of greatest value to the company. R. V-2906.

In March, 1903, Dumble succeeded Treadwell and Josiah Owen was placed directly in charge of the oil fields as Dumble's assistant and under date of March 25, 1903, Owen made a report to Dumble in which he stated that there was but one horizon and that he had traced its outcrop from the McKittrick to Sunset and found that there was but one oil sand and he believed he could trace the same horizon to the Kern River Field, about twenty-five miles east of the lands in suit. R. III-1619-20.

Owen transmitted with this report a map which is Exhibit 157, showing the anticline running from section 6 of 30-22 through the lands in suit. He

stated that this fold north of McKittrick exposes oil sands in several places and in some of the exposures the sands are strongly impregnated with asphaltum and producing wells ought to be found along these exposures. R. III-1634.

The first direct reference to the lands in suit in the correspondence is in a letter of September 26, 1903, from C. W. Eberlein, Acting Land Agent, to Julius Kruttschnitt. Kruttschnitt replied to Eberlein on October 9th, by wire and by letter from New Orleans and on the same date he wrote D. A. Chambers, the attorney for the Railroad Company in Washington, D. C. The Government endeavored to secure the production of these letters and telegram, or copies, but without success, though Eberlein and Kruttschnitt were examined and Chambers' files were searched. R. III-1477.

On October 12, 1903, Chambers wrote to Kruttschnitt. This letter is entitled "Survey of part of township 30-23, plat approved August 1, 1902", and the first paragraph is as follows:

I have received your letter, dated New Orleans the 9th inst., in relation to the above survey, with copy of Mr. Charles W. Eberlein's letter to you of the 26th ult., and copy of your telegram to him in reply, dated New Orleans the 9th inst.

I find that the plat of part of the above township, approved August 1, 1902, embraces Sections 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35. R. III-1474.



These are the identical sections involved in suit.  
In this letter Chambers further said:

Mr. Eberlein says that no selections of any of these lands had, when he wrote, been made by the Southern Pacific R. R. Co., but that he expected to tender a selection list within a week or ten days from the date of his letter to you, and he suggested that you might ask that special attention be given here to the patenting of this list.

As soon as advised that such list has been transmitted by the R. and R. to the General Land Office, I will at the earliest possible date urge the issuing of a special patent for the lands selected.

Please call Mr. Eberlein's attention to the fact that the Commissioner of the General Land Office, by his telegraphic order of February 28, 1900, to the R. & R. at Visalia, suspended from disposal the lands in T. 30 S., R. 23 E., together with the lands in a great many other townships, upon allegations that the said townships contained petroleum.

Upon inquiry to-day I find that this withdrawal order as to T. 30 S., R. 23, E., has not been revoked, and will not be until a Special Agent has reported that said lands are not petroleum lands.

Mr. E. C. Ryan (office at Los Angeles, Cal.) is the Special Agent who has been directed to report upon a large body of lands in the Visalia land district, embraced in the Commissioner's order above referred to. Mr. Ryan has been

here lately, and has been urged by officials of the Land Office to report as rapidly as possible upon the townships involved.

I presume the Register and Receiver may not approve the lists of the lands in this township which Mr. Eberlein has tendered or will tender, because of the Commissioner's aforesaid order of February 28, 1900. If Mr. Eberlein will write me just what lands he desires to select in T. 30 S., R. 23 E., I can ask the Commissioner of the General Land Office to direct Special Agent Ryan to examine said lands as quickly as possible and make special report as to their character. R. III-1474.

While the Railroad Company claims that it had nothing to do with the selection of Ryan to make the examination, this letter shows that Chambers intended to ask the Commissioner to appoint Ryan to do the work. He was the man the railroad wanted because it knew he was not qualified to examine the lands geologically. And in Chambers' letter of December 10, 1903, to Eberlein, advising him that he had requested an examination of the lands by a special agent and that the Commissioner had directed an examination, he said "I presume the special agent is Ryan, but I am not advised positively about this." R. III-1482. And again in his letter of December 16 to Eberlein, he wrote that he "supposed this special agent is Mr. Ryan but was not sure." R. III-1485. Chambers knew what was going on because in his letter of January 13, 1904, to Eberlein, he wrote that "*confi-*

*dentially*" he had been allowed to read the letter of instructions from the Commissioner to Ryan of date December 10, 1903. R. III-1488.

On October 18, 1903, Eberlein wired Chambers in regard to the lands in suit and on October 19, Chambers wired Eberlein, suggesting that he should "immediately select" these lands, adding "this ought to be protection against adverse claimants filing or alleging settlement later than our selection. Right of railroad company to indemnity lands is determined by their status at date of selection." R. III-1479.

Here we have Chambers urging haste and immediate action to get in ahead of adverse mineral filings or agricultural settlements. Chambers was evidently of the opinion that the filing of the selection list would cut off adverse claimants.

He realized from the examinations and reports which had been made by Treadwell, Owen and the other railroad oil experts, that unless the lands were immediately taken up, they would be lost to the railroad by mineral entries and he wanted their status fixed as agricultural lands forthwith. The official survey of these lands had been filed just a few months before.

On October 24, Chambers wrote Eberlein confirming his telegram of the 19th, saying:

I thought you should tender an indemnity selection list for such lands, notwithstanding that township is now suspended from entry

on account of allegations that it contains petroleum, and that if the R. & R. refuse to accept the list, you should take an appeal to the Commissioner. R. III-1480.

While this correspondence was going on between Eberlein, Kruttschnitt and Chambers, G. A. Stone, Eberlein's assistant, was preparing the selection list for these lands, Dumble, the Company's "consulting geologist," having pressed for their selection because he thought they were oil lands. R. II-1029.

When Dumble forwarded to Kruttschnitt on September 21, 1903, the letter or report of Owen, the associate geologist, of March 25, 1903, he enclosed "maps". R. V-2913. The maps enclosed were, we contend, Exhibit 157, Owen's map of untested anticlinals, tracing the Elk Hills anticline across the lands in suit, and Exhibit 115, Treadwell's map showing withdrawal of lands surrounding the lands in suit, because in or near oil territory. The defendants' claim that these were not the maps sent to Kruttschnitt will be adverted to later.

Both Kruttschnitt and Dumble disclaimed having anything to do with the selecting of the lands in suit, while Eberlein testified that he had no personal knowledge of the lands but relied upon Stone who testified that Dumble was pressing the selection of these particular lands. In this connection the following statement about this selection list in a letter from Eberlein to Chambers, dated December 10, 1903, is significant:

I am particularly anxious in regard to this list as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it. R. III-1577.

On November 7, 1903 (Stone having prepared the selection list), Eberlein made the two nonmineral affidavits accompanying the list and heretofore referred to, and filed the same in the local Land Office at Visalia, Cal., on November 14, 1903. R. VI-3752.

On November 17, 1903, the Local Land Office rejected the list because the lands had been "suspended from disposition" by the order of February 28, 1900, of the General Land Office. R. VI-3756.

On November 30, 1903, Chambers wired Eberlein recommending an appeal to the Commissioner of the General Land Office (R. III-1481), and on the same date requested the Commissioner to have an investigation of these lands made immediately by a special agent with the purpose of having them released from suspension. R. III-1483.

On December 9, 1903, W. F. Herrin, General Counsel of the road advised Chambers that an appeal had been taken and on December 16, Chambers wrote Herrin that the Commissioner of the General Land Office had ordered an examination of the lands as requested and said further in reference to the appeal:

It did not seem advisable to me that the Company at this time should take steps to

get a hearing as to these lands. R. III-1483-4.

He also discussed the suggestion that Chambers had made that he try to induce Ryan, the special agent, to make a report. Eberlein did not think it would do to ask Ryan for a report on the lands selected by the Company, but he suggested that the Department be asked to suggest to Ryan that he make a report of so much of the lands within the suspension limits, which embraced a very large area, as he had examined and

we would then be relieved from the danger of having called particular attention to any locality. R. III-1577-80.

No one can read this letter without concluding that Eberlein was satisfied that the lands were oil-bearing and that a careful examination would reveal their true mineral character to the Government land officers.

On January 6, 1904, Eberlein criticized Chambers for not following the suggestion in his letter of December 10, 1903, that no request be made for examination of special lands selected by the railroad and on January 13, 1904, Chambers replied that he had taken the course he did before receiving Eberlein's letter, but assured Eberlein there was no danger because the order to Ryan was general and quotes the order in which it is stated that the Department has no force to assist him and that his report will be based upon examinations heretofore made and his familiarity with the country generally. R. III-1485-7.

This letter of January 6 in which Eberlein disapproved of Chambers' action in asking a special examination of the lands in suit, was not produced by the railroad though Mr. Hoehling, Chambers' successor, was subpoenaed to produce all the correspondence between Chambers and Eberlein. R. III-1478, 9.

On January 22, 1904, E. C. Ryan, Special Agent, made his first report, recommending that the lands in controversy be relieved from suspension and on February 11, 1904, upon receipt of this report, the order of suspension was revoked by the Commissioner of the General Land Office. R. III-1555.

Nothing further was done with the appeal which had been forwarded to the General Land Office on December 11, 1903.

On March 22, 1904, Ryan, Special Agent, made an additional report covering 45 townships and including the lands in suit, in which report he recommended that those lands be relieved from suspension on which there were no wells producing oil in paying quantities (R. III-1560-7), and on April 5, 1904, the Local Land Office was notified that the lands in township 30-23 were relieved from suspension. R. III-1568.

On June 20, 1904, Eberlein made another affidavit that he had caused the lands in suit to be carefully examined as to their mineral or agricultural character. This was received by the General Land Office July 20, 1904. R. III-1573.

On August 31, 1904, Eberlein caused a new selection list, with correct base lands to be filed, and made two affidavits identical with those which accompanied the original list and filed the same September 6, 1904, and it was upon this list that the patent was issued on December 12, 1904. R. VI-3775.

*(a) Eberlein refused to execute the lease to the Kern Trading and Oil Company in August, 1904, because it fixed the mineral status of the lands in suit and the Government would have good ground for refusing patent, if the facts were known.*

The Kern Trading and Oil Company, one of the defendants, had been organized by Kruttschnitt on May 31, 1903, as the fuel department of the railroad and it was his plan to transfer to that Company all the oil lands of the railroad for the production of oil. R. V-3100.

Kruttschnitt had requested Dumble to prepare a statement of the property to be taken over by the Kern Trading and Oil Company, and on September 21, 1903, Dumble furnished the statement, saying:

The Kern Trading and Oil Company should acquire by purchase or lease such lands now belonging to the Southern Pacific Company as we consider valuable for oil purposes. The attached maps show these under three heads; first, oil lands proven or practically proven, colored red; very probable oil lands, colored green; probable oil lands, colored blue. Of the oil value of the first two classes, there is



very little doubt; the third depends in part upon the continuance of normal dips and conditions but in addition, it represents untested anticlinals which show good indications of oil. I consider that all of these lands should be under the control of this company. R. V.-2912.

On August 2, 1904, a few weeks before Eberlein made the last non-mineral affidavits, a lease transferring from the railroad to the Kern Trading and Oil Company many thousand acres of oil lands, including lands interspersed with those in suit and one section in township 30-23, in which the lands in suit are located, and adjoining these lands, was presented to Eberlein to sign on behalf of the Railroad. The lease was presented by C. H. Markham who had succeeded Kruttschnitt as General Manager of the railroad, and who was president of the Kern Trading and Oil Company, and had executed the lease as such President. R. V-3086; II-1101, 8.

Eberlein realized that the execution of this lease by him would not square with his conduct in signing the nonmineral affidavits, as the lease conveyed to the oil company for the production of oil, lands adjoining those he was trying to secure for the Railroad Company as non-oil-bearing, agricultural lands. Dumble, the Company's geologist, had selected the lands to be included in the lease. Eberlein, in December, 1903, had advised Chambers that Kruttschnitt was very solicitous about getting this patent because the

lands adjoined the oil territory. Now it was proposed by the Railroad Company to fix the mineral character of the lands by conveying the adjoining and interspersed lands to a subsidiary company for the purpose of developing their oil contents. This lease presumably would be recorded and it couldn't be kept secret. So Eberlein being anxious to secure the patent and likewise not being willing to be placed in this inconsistent and anomalous position, refused to sign the lease. R. II-1128.

The lands in the proposed lease included about 25,000 acres adjacent to the lands in suit and located along the eastern base of the Temblor Range beginning northeast of McKittrick and extending southeast for 30 miles to Sunset. R. II-1106.

Owen was the railroad geologist in the field, reporting to Dumble, and he told S. P. Wible, banker and oil operator, just about the time of the selection in 1904 that if the railroad selected the lands in township 30-23, it would be selecting mineral lands; that he (Owen) had reported them as mineral lands, and the Railroad Company had no right to select them. R. I-324-5.

Eberlein having received the proposed lease August 2, 1904, with request that he sign it, declined to do so for the reasons which are set out in his letters, but he did not relax his efforts to get the patent and on August 31, 1904, made the third and last set of nonmineral affidavits and filed them September 6.

On September 3, 1904, between the time of making and of filing the last nonmineral affidavits, Eberlein wrote to W. D. Cornish, Vice-President of the railroad, located in New York, in charge of land matters, a letter marking it "personal" in reference to the lease to the Kern Trading and Oil Company, which was then with him for his signature.

He wrote that he was totally in the dark as to the object of this corporation; that he was told in a general way that it was organized for the purpose of taking over the oil lands of the railroad and operating the same; that the proposed lease covers all the lands now in the ownership of the railroad that either "are or are supposed to be oil bearing." Continuing he wrote as follows:

I can stave off the delivery of this document for some time yet, I think, for the reason that if the knowledge of this lease becomes public property it will probably cause us a great deal of trouble in the United States Land Office, and may result in the loss of a large body of adjacent lands which may hereafter turn out to be mineral and oil bearing. \* \* \*

I have just succeeded in getting the special agent in charge to make a report releasing our land from interdictment.

If it becomes known that we have executed a lease of lands interspersed with those already under selection by us, and that the lease is for oil purposes, it seems to me that it will immediately encourage oil speculators to file

upon the lands so selected and that the government will have good ground for refusing patent, inasmuch as we practically fix the mineral status of the land by this lease. R. II-1075-8.

Eberlein in this letter requested Cornish to wire him, but not hearing from him, Eberlein testified that he went to New York in the fall of 1904 and carried the secret file of correspondence with him (R. II-1257) and held a conference about this lease and they—

agreed as to the impropriety of a lease at that time. . . . He [Cornish] was very positive in his instructions that I was not to sign it or to recognize it. He considered it an improper lease to be made, having reference to the selection list of lands in the immediate neighborhood. R. II-1125-7.

Eberlein further testified that he and Cornish

naturally recognized at least the very ambiguous position in which we would be placed, both of us, by that lease, if that lease were made—and especially if I made the lease, I having also made the selection list which was at that time unapproved. R. II-1128.

After Eberlein wrote to Cornish on September 3, his next letter was on September 10, 1904, to C. H. Markham who had presented to him for signature the lease to the Kern Trading and Oil Company.

He wrote:

There is a very urgent reason for delaying the execution of these papers.

We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease, and which we have represented as nonmineral in character.

Should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented.

We could not successfully resist a mineral filing after we have practically established the mineral character of the land.

I would suggest delay at least until this matter of patent can be adjusted. R. II-1055.

On September 19, 1904, Dumble wrote Markham a letter in which he returned Eberlein's letter of September 10, which Markham had sent to Dumble. On October 5, 1904, Dumble wrote Eberlein requesting a conference. On October 7, 1904, Eberlein answered suggesting a conference the next day, in room 71, where they could have a room to themselves. R. II-1065-6. On October 8, 1908, Eberlein through his assistant, Stone, furnished to Dumble plats showing the status of the railroad lands in certain townships, including township 30-23 in which the lands in suit are situated. R. II-1067.

On December 7, 1904, Dumble wrote W. H. Bancroft, Acting General Manager, as follows:

In connection with our correspondence regarding the transfer of property to the Kern Trading & Oil Company, I have had a conversation with Mr. Eberlein and it seems for

reasons of policy regarding certain unpatented lands that it will be best not to execute the lease of lands between the S. P. R. Co. and K. T. & O. Co. at present. R. II-1072.

This conference with Dumble was more than two months before the patent was issued. Dumble disclaimed having anything to do with the selection of the lands in suit, though Stone said he pressed for their selection. After the fire of 1906, following the earthquake in San Francisco, Dumble was trying to find the lease of 1904. Eberlein was approached and denied any knowledge of any lease and on March 15, 1907, Dumble wrote to Eberlein reviewing the correspondence with reference to the lease and among other things said:

Early in December we had a further conference on the matter and you explained that you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger was passed. On December 7, 1904, I wrote Mr. Bancroft explaining this and suggesting that the lease be held up temporarily. R. V-2957.

Dumble being asked what was the danger he referred to, replied:

Danger of interfering with him [Eberlein] and the danger that these lands might be delayed and not be patented because of their mineral character. R. V-2986.

(b) *The Correspondence Concerning the Lease of Oil Lands to the Kern Trading and Oil Company was kept separate from the general files and guarded with the utmost secrecy.*

The "personal" letter to Cornish from Eberlein, dated September 3, 1904, protesting against the signing of the lease is the beginning of the correspondence which Judge Bean finds "was kept separate from the general files of the office and guarded with the utmost secrecy until compelled to be produced" by the Government.

Eberlein testified that the correspondence with reference to the proposed lease was not kept in the files at all but in the safe deposit vaults of the California Safe Deposit and Trust Company and when needed it was brought into the office and kept in a separate place in the safe. R. II-1082-1133. Eberlein testified Cornish's

instruction was that I was to keep those to myself. He said they might hereafter be necessary for my protection. They have been kept by me ever since.—And incidentally for his own protection. R. II-1128.

G. A. Stone was the only person who had access to that safe. Eberlein said the file remained constantly in his individual possession until it was "pried out of" him at the hearing in Los Angeles. R. II-1272.

Cornish, as we have seen, instructed Eberlein to secretly preserve the correspondence relating to the

Kern Trading and Oil Company lease, beginning with the letter of September 3, 1904, from Eberlein to Cornish.

Eberlein was asked if he ever had any conversation with Cornish after the fire of 1906 in reference to the disposition or destruction of this correspondence and Eberlein testified that on a private car out of Ogden in the fall of 1907 Cornish "said that inasmuch as the papers of the company in the Land Office were destroyed," he had destroyed all of the papers he had received from Eberlein. R. II-1074-5. It turned out, however, that the correspondence, while greatly damaged by the fire, was not destroyed and Eberlein caused copies to be made from the scorched papers, and that is how this correspondence happened to be preserved.

The same secrecy which had obtained in the filing and preservation of this correspondence was maintained in having it copied. The copying was done two weeks after the fire under the supervision of G. A. Stone. Mrs. Cunningham, who was the copyist, testified that when Stone—

handed me these letters he said for me to copy these papers and not to allow them to go out of my hands to anyone else in the office, none of the stenographers, but I was to keep them myself and return them to him personally. . . . Mr. Stone told me to see that they were correct and to compare them with Mr. Koch.



He told me to go over and sit on one side of the room near a little bay window of the office and compare them in an undertone, which we did. . . .

There was an air of secrecy about the handling of these papers. He told me not to give them into the hands of any other clerk in the office. . . . If there was a duplicate of this file in the office before the fire I didn't see it, it was not kept in the general files. . . . I was impressed at the time that these papers were practically private and he said little things to give me that impression. . . . I concluded there was something very secret and vital about those papers. R. II-1321-3.

If Eberlein, after the selection list was filed but before patent, acquired knowledge or information showing that the lands selected were mineral, though his affidavit was innocently made at the time, it would have been his duty to disclose the after-acquired knowledge or information to the Land Office.

Though a party making a representation may at the time believe it to be true, and have made it innocently, yet, if, after discovering that it was untrue, he suffers the other party to continue in error and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes in contemplation of a Court of equity, a fraudulent representation, even though not so originally. *Kerr on Fraud and Mistake* (3rd. ed.), 55, 56.

It will be recalled that when Eberlein filed the selection list in November, 1903, he had recently taken charge of the Land Department of the Railroad Company, and he claimed to have no information about the lands. But before he filed the rearranged selection list in September, 1904, he knew the Railroad Company, through its geological department had segregated the oil lands then owned by the company from its agricultural lands and that the lands interspersed with the lands he had selected for patent were classified as oil producing lands and he had refused to execute the lease conveying these adjacent oil lands to the Kern Trading and Oil Company, because if these adjacent lands were believed by the oil experts of the company to be suitable for oil development, it followed that the lands he had selected for patent were likewise valuable for their oil contents.

When he acquired this knowledge he had not filed his rearranged selection list. Instead of saying to the Company, "I will not proceed further with this application, because I cannot in good faith make the non-mineral affidavit" as it was his duty to do, what did he in fact do? He advised Judge Cornish, Vice-President in charge of land affairs, C. H. Markham, General Manager, and E. T. Dumble, Chief geologist, that what had been done must be kept secret. If knowledge of it reached Washington, the Government would have good ground for refusing the patent. Eberlein was careful to see that he should not be put in an inconsistent position, by *openly* doing two acts which were utterly inconsistent—that

is, represent under oath that one section was non-mineral for the purpose of securing an agricultural patent and represent under his hand and seal that an adjoining section was so valuable for oil, that it was to be conveyed to a company to develop its oil contents for commercial purposes. The known geological conditions and structure of both were identical.

Cornish agreed with Eberlein that the lease was improper. Dumble agreed with Eberlein that the situation was fraught with danger—"danger that the Land Office would refuse the patent because of the mineral character of the land" to use Dumble's language, if knowledge of the conduct and belief of the railroad officials should become known. Accordingly, it was agreed that the lease should be held up until the patent should be obtained and Eberlein proceeded with his application for the patent. He never signed the lease and secretly kept it in a private vault, satisfied that should this patent be attacked (as he testified he anticipated, R. II-1093) the files of the company would not compromise him, for he had not signed the lease and the correspondence about it was in a private vault. That Eberlein tried to so act as to be in a position to claim that he was in no way connected with the lease and knew nothing of it, if any trouble should arise, is shown by the fact that in February, 1907, he disclaimed any knowledge or information about the lease, although at that time he had in his possession all the correspondence concerning it. This had been badly charred by the San Francisco fire of 1906 and he had destroyed it after

having it copied in a most secret way. He thought that all the records had been destroyed except this secret file which was saved from the wreck by being in a private safe separate from the general files. That this correspondence, which conclusively shows the conscious wrongdoing of those concerned, was unearthed and secured by the government for this trial is a most fortunate circumstance in the interest of truth and justice. Eberlein testified that the only way that the Government got hold of it was that "it was pried out of him" at the hearing at Los Angeles. R. II-1272.

*(c) Stone's threats, after his discharge, to reveal to the Government the confidential knowledge he possessed in regard to the irregularities in connection with the patenting of lands, and especially the selection of the lands in suit, resulted in his securing a pension from the Railroad Company.*

It will be recalled that G. A. Stone was land grader under Madden and when Eberlein succeeded Madden in 1903, he retained Stone and appointed him his assistant and Stone acted as land agent during Eberlein's absence and that Eberlein relied upon Stone in selecting the lands in suit and that Stone made up the list because Dumble pressed him to do it. Stone was the only man in Eberlein's office who had access to the file of the Kern Trading & Oil Company. It was he whom Eberlein selected to have copies made in 1906 of this file.

In December, 1907, Eberlein discharged Stone because he would not do what he was told to do, and on January 8, 1908, Stone wrote to General

Manager Calvin advising him that Eberlein had discharged him without good cause and asked that he be given employment in some other department, calling attention to his long service. He sent a copy of this letter to Kruttschnitt and to Judge Cornish and wrote Kruttschnitt as follows:

As land examiner and assistant land agent I have obtained a knowledge of the lands and records not possessed by any other official or employee of the company, but notwithstanding this, and though I have for several years borne a large part of the burden, Eberlein has seen fit to force me out. I think the quality of my work and the confidential character of my employment in the land department indicate that the best interests of the company will be served by not turning me down after long and faithful service. R. V-3117.

Calvin wrote Stone that he had no jurisdiction over the affairs of the land department and could offer him no other employment.

On February 14, 1908, Stone wrote to Eberlein suggesting retirement if his services were no longer desired, but he received no reply to this letter. Thereupon, under date of March 23, 1908, he wrote again to Kruttschnitt referring to the above correspondence with Calvin and Eberlein and concluding his letter with this threat:

I served the company faithfully and well many years and hoped that its interests would always be mine, but if a hearing and fair

treatment are not accorded me without further delay, my services will be at the disposal of the Newspaper Press, the United States Attorney General, and others. R. V-3116.

Before the receipt of this letter Kruttschnitt had, on February 19, wired Cornish as follows: "Referring to our conversation about G. A. Stone, will you please let me know what the trouble is in the matter." Cornish replied by wire that "Stone was dropped in the interest of economy and because he was no longer needed for the kind of work which he preferred to do." On February 24, Kruttschnitt communicated to Calvin the contents of Cornish's telegram. Following this threat of exposure Stone was pensioned though he had been discharged for insubordination.

It is safe to conclude that Kruttschnitt would not have permitted Stone to be pensioned after his threatening and insulting letter but for the fact that he knew it was for the best interests of the Company, as Stone suggested. If they turned him down, he would reveal to the Government the facts in regard to the patenting of lands which would show fraud, many of which facts he alone of the employees knew, for he had "a knowledge of the lands and records not possessed by any other employee." It was this knowledge that the officials did not wish the Government to obtain; knowledge as to the facts surrounding the selection and patenting of the lands in suit; knowledge of the records concerning the secret transfer to the Kern Trading and Oil Company; Stone being the only employee who had access to this file.

Kruttschnitt knew of Stone's connection with these matters. The lease to the Kern Trading and Oil Company had never been recorded or made public. R. V-3103.

(5) THE KNOWN CONDITIONS AT THE TIME OF THE PROCEEDINGS WHICH RESULTED IN THE PATENT WERE PLAINLY SUCH AS TO ENGENDER THE BELIEF THAT THE LAND CONTAINED OIL DEPOSITS OF SUCH QUALITY AND IN SUCH QUANTITY AS WOULD RENDER THEIR EXTRACTION PROFITABLE AND JUSTIFY EXPENDITURES TO THAT END.

Judge Bean's fifth finding of fact is as follows:

(5) *From a careful examination of the evidence I have reached the conclusion that the topographical and structural formation and character of the lands and of the surrounding area, their proximity to and the known extent of oil development and oil lands to the south and west, and extending out and towards the lands in question, the seepages on or near the lands and the anticlinal structure thereof, and the then known surrounding conditions "were clearly such as to engender the belief that the lands contained mineral (oil) deposits of such quality and in such quantity as would render their extraction profitable and justify expenditure to that end" at the time of the proceedings which resulted in the patents. R. I-77.*

The known conditions will be considered as follows:

(A) The anticlinal structure of the lands in suit.

(B) Their situation with reference to the diatomaceous shales which are the source of oil in California.



(C) The seepages, oil sands and other indications of oil in the Elk Hills and upon the lands in suit.

(D) The indications of oil in the vicinity of these lands.

(E) The oil development in the McKittrick, Midway, Sunset and Kern River Fields.

(F) The dip of the oil sands and strata exposed in the outcroppings along the oil development from McKittrick to Sunset.

(a) *The Elk Hills are of anticlinal structure which is most favorable for the accumulation and retention of oil.*

The lands in controversy are situated near the center of the Elk Hills and lie on both sides of its summit. R. II-690.

A. C. Veatch testified: The Elk Hills

are an elongated group of hills extending northwest and southeast, about sixteen miles long, six or seven miles wide in the widest portion, which rise rather abruptly from the San Joaquin Valley, on the western side, to an elevation of a thousand to twelve hundred feet above the level of the valley. R. II-688.

They are separated on the south from the Buena Vista Hills by a relatively level valley from which they rise to an elevation of five or six hundred feet. R. II-688. They are a semi arid desert, sparsely covered with sage brush and having no agricultural value whatever. The Elk Hills are structural hills, by that is meant they are an anticlinal fold, in which



the present topography shows the essential shape of the fold and that fold

has a few subordinate wrinkles in it, and it is those little wrinkles in the grand uplift or fold which have been referred to as different anticlines. They are anticlinal axes of minor folds. The whole hill itself is a great fold.

The anticlinal plunges and that gives an elongated dome shape. R. II-714. The Elk Hills "are elongated domes of ideal structure for oil accumulation." R. II-703.

The structural character of the Elk Hills is evident even to the most casual observer. R. II-702. Structural hills like the Elk Hills are not made by erosion, by the action of water, but are formed by the twisting or torsion of the crust of the earth, which gradually folds the stratified beds up until the hills are formed by the pressure. Erosion following the folding up of the beds enables

the geologist to examine the character of the rocks as fully and carefully as he could in an enormous trench dug through the surface of the earth. Extending for many miles it forms a much more sound basis for judgment than a single development. R. II-697.

*F. O. Martin*, expert geologist, testified the Elk Hills

may be termed an anticlinorium, meaning thereby an anticlinal ridge with a major anticline and smaller wrinkles, folds, running parallel or nearly parallel to the main ridge.

. . . The dips on either side of the main ridge are low and gentle, giving it a rather broad summit and a more or less dome-like appearance. R. I-612.

*Josiah Owen*, the railroad geologist, in his report of March 25, 1903, to E. T. Dumble, enclosed a map (Ex. 157—R. V-2977) in which the anticlinal structure of the lands in controversy is shown.

*W. H. Ochsner*, another railroad expert, testified:

Where the anticline is as clearly defined as in the Elk Hills we have the elements of an ideal spot by an anticlinal structure. R. IV-2211.

*F. M. Anderson*, defendants' chief expert, testified:

The Elk Hills as a whole is rather a broad fold of dome-like character, in the main.

The anticline of the Elk Hills is a broader arch than that of the Buena Vista Hills. R. IV-2618.

The following practical and experienced oil men testified as to anticlinal structure of the Elk Hills:

*Ira. M. Anderson*, R. I-160; *S. G. Drouillard*, R. I-125; *F. J. Sarnow*, R. I-173-4; *M. S. Waggy*, R. I-179-180; *B. K. Lee*, R. I-227-232; *S. P. Wible*, R. I-320; *Colon F. Whittier*, R. I-469; *Frank Barrett*, R. I-480; *Chas. W. Lamont*, R. I-581, and many others.

The well defined anticlinal structure of the Elk Hills is conclusively shown.

The Circuit Court of Appeals said:

The railroad company's geologists who were in the territory at various times during this

period, . . . must have further concluded that the several uplifts are structural, that is they are the results of a folding or of foldings of the earth's crust, and they would have known that such a fold or anticline is a favorable formation for the accumulation and retention of oil. They would have determined that the principal dip of the country is northeasterly, and the general trend of the fold axes is northwesterly and southeasterly. R. VII-5-6.

Having shown the anticlinal character of the lands in suit, let us next consider its geological significance in relation to the occurrence of oil.

*F. O. Martin*, one of the government expert geologists and mineralogists, testified:

In my opinion the most favorable indication that the Elk Hills must be considered oil lands is the structure of the territory being of an anticlinal character. It is a well known fact that along the summits of anticlines, petroleum tends to accumulate and that the anticlinal summits are the most favorable spots for petroleum to accumulate. R. I-613.

*Dr. J. C. Branner* testified that the general structure of the Elk Hills was perfectly simple and basing his opinion on his general knowledge of the behavior of petroleum in the rocks stated that—

the conditions for the accumulation of petroleum were favorable along certain folds that were easily seen by any geologist,

and

My opinion was that the Elk Hills was the most promising area for petroleum in that

region in the vicinity of McKittrick. R. II-1003;

adding,

The general structure of the Elk Hills is so favorable to the accumulation of oil in that region that if they had gone to five thousand feet and not found the oil, I should still advise a company to not give up hope of finding it. R. II-1008.

*F. M. Anderson*, the chief expert for the defendants, on being asked what sort of structure he regarded as favorable for the accumulation of oil answered:

Usually an anticlinal structure is the most favorable.

Q. And why is that so, Mr. Anderson?

A. It facilitates the accumulation and retention of oil if the right stratigraphic conditions and other conditions are present.

Oil does not as a rule stay in the diatomaceous shales which are the source of oil, but passes out into an absorbing bed—a porous bed—where it accumulates. R. II-1011. In other words there must be a reservoir to contain the oil and the natural oil reservoirs are found in anticlinal structures.

The opinion of the Circuit Court of Appeals said:

It is virtually conceded by the experts for the railroad company . . . that an anticline such as is found in the Elk Hills is an occurrence favorable to the accumulation and retention of oil, to which prospectors would hopefully look upon discovering the presence of oil in adjacent territory. R. VII-8.

(b) *Diatomaceous shales are the source of oil in California and the Elk Hills are situated just in front of the thickest portion of these shales.*

The generally accepted theory is that diatomaceous shales are the source of oil in California. Dr. Branner testified:

The oil in the California fields originally developed from a series of beds that were known in geology as the Monterey shales—a series of rocks made up of the skeletons of diatoms that have accumulated in great quantities, especially about the southern end of the San Joaquin Valley. These rocks were given the name "Monterey Shales" because rocks of the same age and general character occur at Monterey in this State. It is a local name. II-1008.

He said, however, that it was a mistake to say that oil was all derived from Monterey shales.

I instinctively, in looking over lands that I have been called upon to examine for petroleum, have looked about for these diatomaceous shales. Now, those diatoms, you can see from the nature of the case, have been accumulating for an enormous period of time, and they were not necessarily confined to the time in which those Monterey shales were being heaped up; so that we have older beds that have diatoms in them, and we have the later beds, and wherever I have found marine diatoms accumulated in considerable quantities, I have considered that there was a legitimate place to look for petroleum, whether they hap-

pened to be in that particular age or earlier or later. II-1010.

Let us now examine the evidence to ascertain what it shows with reference to the presence of these diatomaceous shales as related to the lands in suit.

Dr. Branner testified that these diatomaceous shale beds—

down towards the southern end of the San Joaquin Valley, have a thickness of over five thousand feet, and a great thickness like that immediately would make a competent geologist prick up his ears, because he would say: "here is a chance for an enormous accumulation of oil." II-1012.

The Elk Hills are situated right about in front of the thick portions of these Monterey shales. The thickest parts beginning up here some way north of McKittrick, come—oh, perhaps twenty miles or more, or so, northwest of McKittrick, and from there down to the vicinity of Maricopa, is the very area in which those shales have those great thicknesses, and these Buena Vista Hills and the Elk Hills lie right off towards the east, northeast, of those hills.

I would not expect the shales under the Elk Hills to be so faulted as to influence the disadvantageous accumulation of oil there. II-1022.

The general geology of the Elk Hills would lead me to infer that Monterey shale was under there and in great thickness. II-1020.

It seems to me that the best chances for oil in the whole country in that region were in the

Elk Hills and the Buena Vista Hills. In forming that opinion I took into consideration the possibilities of the non-occurrence of oil resulting from the conditions of the sand and the pinching and hardness of the stratum, and other interruptions; I think that any reasonable geologist knows that there is a certain amount of risk in any kind of petroleum mining. He counts on that.

I should say decidedly, that the conditions in the Elk Hills are such as to warrant the ordinarily prudent man in the investment and expenditure of money with a reasonable expectation of developing a paying oil property. II-1024.

I should say that if any competent geologist, observing the natural waste of oil about McKittrick and the stage of development in 1900 or a year or two subsequent, and visiting the Elk Hills and making some examination of the structural formation, failed to form an opinion that the Elk Hills were oil in character and that there was an oil bearing zone underneath those hills, he did not understand his business. II-1004.

From my examination and knowledge of the neighboring regions, I have no reason whatever to believe that the oil bearing sands in the Elk Hills are thin, hard or pinched out. II-1023.

*F. M. Anderson*, defendants' chief expert, admitted that the Elk Hills lying out some distance from the line of outcrop are in a favorable position for the thickening of the diatomaceous beds. IV-2627.

Judge Dietrich stated in his opinion that the railroad company's geologists from observations readily made must have concluded that underlying the oil zone from McKittrick to Sunset there were shales in which it is supposed the oil originates and beds of sand into which it migrates, and that the principal dip of the country is northeasterly. VII-6.

(c) *The evidence shows that, prior to patent, the Elk Hills, of which the lands in suit comprise the center, contained well known seepages, blowouts, oil sands, deposits of asphaltum and other indications of oil.*

The testimony establishing the existence of indications of oil in the Elk Hills and the lands in suit will now be reviewed.

S. G. Drouillard, a practical oil man and miner for many years (R. I-114) testified that in 1874 he saw an oil seep in section 32 of 30-24, being the township just east of the lands in suit. "The sand at that time was wet from oil. It would adhere to the hand when you would squeeze it together. There was a prominent smell of gas." R. I-116. He found other seeps north and west in the Elk Hills. In 1899, with Chas. Lamont, Waggy and others, he made locations for oil in Midway, Temblor, McKittrick and the Elk Hills. They found on section 15 of 30-24 outcroppings of oil, it was quite a belt of sand cropping. On the strength of these oil seeps, they located the land. R. I-114.

Referring further to the condition of the seepage on 32 of 30-24, when he first saw it in 1874, Mr. Drouillard testified:



It had a distinct odor. There seemed to be lots of gas in it; it smelled gas and sulphur. It was petroleum gas. I know what petroleum gas is. At that time the seep was wet. It would adhere to the hand and we would pick it up and ball it up and it would stick to your hand. We dug in it possibly four or five inches. There was no water there at that time. This was in the spring of 1874. I was at the seep once in a while afterwards while I was employed riding through the land and the seep remained in the same condition. The last time I saw it was in 1899, when I located it, at which time it was dry. We dug down about two feet into it. We found the gumbo—the sticky stuff—the same as I observed in 1874. It would adhere to the hand. R. I-121.

He showed some of the sand to W. E. Youle and he said it was oil sand. R. I-122.

He found the anticline on section 5 of 30-22, north of McKittrick. There is an oil sand cropping there and he located this. R. I-127. The anticline in the Elk Hills was running parallel with McKittrick, southeast and northwest. The formation of the Elk Hills was exactly like the balance of the country that had oil in it and competent oil men generally regarded it as oil land. R. I-117.

*John R. Scupham*, consulting engineer of the railroad directors (R. I-585), in a trip that he made into the Elk Hills at the direction of A. N. Towne, General Manager of the road, in 1887, found the oil

seepage in 32 of 30-24 which he testified was "the best oil seepage" that he had seen. R. I-587.

It was a fresh seepage. Such indication could not be found in an exhausted oil sand. That it was an active seepage was not visible to the unassisted eye, but it showed freshness of the outflow of oil. The stain was a fresh stain. I could not detect actual oil, but the stain of oil was necessarily recent. There had not been a complete evaporation of it. R. I-597.

*W. E. Youle*, who had had the widest experience and greatest success of any of the practical oil men who testified in this case (R. I-540), testified that he was in the Elk Hills in 1898 and saw oil sands in there then and mineral locations were made as a result of his opinion from a personal observation of the Elk Hills. R. I-551.

I made a chloroform and fire test of the oil sands I found in the Elk Hills. The result showed bituminous matter—gases. The Elk Hills was full of gas. It was burned with gas all over. It was evidence of a very volatile oil and evidence of an oil that might not have much asphalt base. R. I-552. . . .

The territory from which I took the samples covered a mile, anyway, if not longer, about parallel with the strike of the country. I think I got some of the samples in a gulch. I got some on the hills. I found no asphaltum, but I found a sand that was percolated so much that you could put it on a fire shovel and at it a little and it would blaze. And in

making the chloroform test you could get particles of oil.

You could get oil from the territory I examined on those occasions. R. I-574.

My opinion was that that was a prolific oil field, and if I had had my way, I would have drilled there in preference to over at the McKittrick side. R. I-569.

I saw oil sand pretty near the summit of the Elk Hills. R. I-573. I found through the Elk Hills many evidences of gas. That was shown by the peculiar look of the formation that has been attacked by gas. . . . It is a grayish color and has a glassy appearance, and manifests itself everywhere where gas is escaping. . . . One or two places we put a can over it and let it accumulate, and then lit it. R. I-574. . . . The occurrence of gas would be an indication of oil. . . . It was not marsh gas. R. I-575.

I would have advised any company to furnish the money to the extent of \$50,000.00 or \$100,000.00 to develop that country. R. I-577.

*John Jean* testified that Chas. Lamont showed him some oil sands purporting to have been brought from the Elk Hills and Lamont took him out where these oil sands were found. It was a black coarse sand; dry oil three feet in depth and 100 feet in length and breadth. It looked like dry oil, burnt sand. R. I-127. Jean further testified that he reported this to L. G. Sarnow and to J. B. Treadwell who at that time was in charge of oil development

for the railroad at McKittrick. Sarnow was an oil driller. He took Treadwell and Sarnow to these oil sands. This was in 1899. They examined these oil sands at that place and both said it looked good and on the strength of that discovery Jean, Treadwell and Sarnow made oil locations on section 31 of 30-24 near the oil seep. This is the section adjoining the section on which the oil sand was located in 32 of 30-24. R. I-129.

*L. G. Sarnow*, who had large experience in the oil business and for a number of years had charge of the Kern River field for the Southern Pacific and drilled thirty wells there for Treadwell and three in McKittrick, testified that "the formation of the Elk Hills is shale, gypsum, and sand. It is substantially the same formation over in the eastern flank of the Temblor Range." R. I-134. John Jean showed witness some sand and he wanted to know where it came from. It was a coarse, pebble oil sand and witness was interested in it when he first saw it. Treadwell also saw it. Jean took witness and Treadwell to the place in the Elk Hills where he got the sand (section 32 of 30-24).

Apparently it was a blow-out. There was an anticline that came to the surface in a way. It was just the same as you would find in Temblor. . . . On the strength of that showing, Mr. Treadwell, and Mr. Jean and I located the land. With reference to that oil sand, we did not locate just on the sand. I remember the sand was on one side of it and we seemed to figure that it came from the

McKittrick or Temblor and we took the land that we thought to be in the strike. R. I-135.

There were three traces of blowouts off a little further to the west, but not as prominent as these others. They might have been in section 30 to the north. I would not say, although it was right next to where we located. That is as near as I can get to it. I never had any tests made of that material. I didn't need any. I didn't think so. That was oil. I don't think it was possible that I was mistaken as to that containing oil, although I wouldn't say it is not possible. I have never known of similar blow-outs being tested by chloroform tests and showing nothing. R. I-141.

*M. S. Waggy*, an oil producer of many years experience, testified that he made locations for oil in the Elk Hills in 1899 or 1900. That he found a break or blow-out-seepage in the N. W.  $\frac{1}{4}$  of section 32 of 30-24. The sand there was practically dead. There was an odor of oil in it; it was stained black; it was oil sand. S. G. Drouillard told him about the indications there and got him to go in there. R. I-175-6. He testified that he and his associates, Chas. Lamont, Mr. Packard and others located eight or ten sections in 30-23 and 30-24. He would throw the deposit he found there on the fire and it would make a smoke and smell and would blaze up after it was heated and give an odor of oil or gas. R. I-177. Later on tunnels or shafts about twenty feet deep were dug near those locations and showed indications of oil. R. I-178.

In 1899 he regarded the Elk Hills as good oil territory because "we had the same indications as we had where we were getting oil. Better indications than in the Kern River field where we were getting oil." R. I-180. Witness testified there were other indications of oil in the Elk Hills. There was an outcropping on section 26 of 30-23. R. I-181.

*Samuel P. Wible* became interested in the oil business in Kern County about 1898 and drilled wells in Kern River field, McKittrick, and Temblor. In 1902 he went into the Elk Hills to examine them and investigate their oil possibilities. He heard there was a seepage on section 32 of 30-24 and saw it afterwards.

It is not what you call an oil seepage; it is what you call a brea bed. Evidently oil or gas had been in it at one time and dried out at the present time. R. I-318-9.

In 1903 or '04 Wible went through the easterly part of the Elk Hills with Josiah Owen, geologist for the Southern Pacific, who was engaged in examining and classifying its lands. He was going to show witness the outcrop on section 32 of 30-24. Owen had been in there before and "was very familiar with the formations of that country and particularly with reference to the Elk Hills, including township 30 South, Range 23 East." He testified he knew Owen regarded the Elk Hills as oil territory. R. I-320-1.

Witness testified that—

there is a decided oil showing in what I would call the North extension of the Elk

Hills. It is beyond the railroad tracks to the west. The evidence consists of oil sand crops in a number of places. As early as 1901 and before 1904 there were two oil wells on section 6, in Township 30 South, Range 22 East, and there was one on fractional section 1, Township 30 South, Range 22 East. These wells were on the same anticline; the one I refer to on the Elk Hills. R. I-321.

The formation of the lands in Township 30 South, Range 23 East, and 30 South, 24 East, consisted of shale, sandstone and clay and Fuller's earth and gypsum. . . . In that formation, Fuller's earth and gypsum generally occur in conjunction with oil. R. I-322.

*F. J. Sarnow*, oil driller for the Southern Pacific, testified there are oil outcroppings in the Elk Hills on section 14 of 30-22.

There are oil crops and sand on the east side of the railroad there on that section and there is dry oil and overflow on the west side of the wagon road.

He testified that there were four or five outcroppings of oil sands in the Elk Hills.

I know of oil sands in the hills southwest of Miller & Lux's ranch. They were around in that country about section 25, of 30-23 and section 30 of 30-24. R. I-169.

Witness testified that he was then drilling wells in section 6 of 30-22 on the same anticline that runs through the lands in suit.

This anticline is an outcropping of oils sands and blow-outs and the formation surrounds it. The formation is shale, clay and gypsum. The oil sands show stratification from which you can determine it is an anticline. R. I-173-4.

*W. G. Sylvester* testified that he first examined the Elk Hills in January, 1900, and found evidence of oil. Started at Headquarters Ranch and saw indications of what he would call asphaltum.

It was a formation similar to the blow-outs they have at McKittrick. R. I-359.

It was four or five miles west of the ranch and a little south. R. I-356. This would be in 30-24. R. I-359.

We found a rather recent oil seepage which was somewhat dried out although it would burn giving off an odor like coal oil or gasoline. We found this seepage in a gulch and we found asphalt high up on the hill. I located about ten or twenty claims at that time. R. I-356.

His locations extended into four townships, 30-23, 30-24, 31-23 and 31-24. R. I-357.

*J. W. Kaerth*, who assisted *J. M. Duce* in 1901 in making the official survey of the lands in suit, testified that their camp was on section 33 of 30-23 and he found evidences of oil and asphaltum over a good portion of that township. R. I-420. They called them asphaltum reefs or ridges. R. I-417.

The surface of them was a sort of grayish color. As we broke into them they were quite



black, but the outer surface was gray. The material would burn. We did burn it in our camp fires. R. I-420. I remember two or three small oil seepages on the land, what appeared to be oil seepages, small places on the land. R. I-418.

Witness testified that he made the field notes of the survey, transferred them into a book and turned them over to Mr. Duee. In the notes he wrote the general description of the land:

I characterized the land as mineral. That was done by reason of what I observed on the ground, in the way of asphaltum reefs and oil seeps. R. I-423.

Attention has already been called to the plat of the official survey of 30-23, filed in the Local Land Office in May, 1903, setting forth that the surface of the ground in this township "shows a geological formation, with asphaltum exudations, that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits." R. II-686.

*H. P. Dover* testified that since 1901 he had been in the oil business and there was in 30-24 a kind of blow-out in a large gulch which showed indications of oil in both sides—discolored clay and some sand.

It showed a stain of oil in my opinion. We detected it a little with ether. R. I-461.

There was a little seepage of oil in section 23 of 32-23. . . . It was not like the seepage in 32 in the Elk Hills. There was oil in 32 oozing out of the ground. R. I-467. I am interested in one other section in the

Elk Hills; section 30, I think, 30-24. I think it is near the blow-out. R. I-462.

*Chas. Brisco*, who was engaged in the business of oil prospecting and development at McKittrick from 1897 to 1904, testified that he found—

a small brea bed—dried oil, dried asphaltum—in the Elk Hills, in the east slope of the Hills about 12 or 15 miles south and east of McKittrick. This was about 1901 or 1902. Before 1904, witness took Josiah Owen, the geologist for the Southern Pacific, to this brea bed. It consisted of dry dirt and asphaltum, all mixed together. . . . It would burn as we tried it. R. I-335-6. There was dried oil there, that is, it was dried in the dirt and shale.

Mr. Owen said to witness that "it was a fissure that had been blown out there. . . . "This is good enough, hang on to it." R. I-340-1.

Wherever you find brea it is an indication that there is an oil belt there or near there somewhere and it has been oozed out there by the gas. R. I-341.

*N. C. Farnum*, actively interested in the oil business for many years, testified that he made a detailed examination of the Elk Hills in 1899, looking for oil sands and other evidences of oil (R. I-495), and located an oil seepage in section 32 of 30-24 in a canyon.

The sand at the oil seepage in 32 of 30-24 had been saturated with oil. I tested it. R. I-496.

I am very well acquainted with the gap the railroad comes through to McKittrick. It is

in 14—30—22. There is a well defined anticline there. . . . There is evidence of waste oil there; dry oil in the sand there. R. I-496.

W. E. Youle reported to witness that—  
there had undoubtedly been oil in this canyon, on section 32—30—24, and that the country between there and section 14, in 30—22, where the anticline is exposed by the action of the water, had the appearance to him of oil land. R. I-498.

*Frank Barrett*, sixty-seven years old, who has been in the oil business practically all his life (R. I-478), testified that he first visited the Elk Hills in 1899 to examine them and was paid \$100 per day and expenses, and "found two or three places where there had been seepages, . . . it was not asphaltum, it was oil." R. I-479. He took some of the outcropping home with him and from the smell you could just get a little odor of oil, but when he crushed it and applied the chloroform test, he got traces of oil. This oil seepage was in 30—24 near section 23 and witness thinks it was in section 17. R. I-480.

It was not in section 32—30—24. R. I-482.  
"I found some three or four seepages where oil had seeped out and caked. All of the lighter properties, of course, had evaporated. . . . There was one blow-out that I saw that was a live seepage with actual oil coming out of it. . . . It was in the Elk Hills. R. I-483.

This is the seepage that witness located as being in section 17 of 30—24.

I don't think the characteristics of the formation of the Elk Hills are at all dissimilar to the formation around McKittrick and not dissimilar to that at Taft and Maricopas. R. I-480.

*Colon F. Whittier*, who had been in the oil business fourteen years and the output of whose wells was one million barrels of oil the past year, testified that there is some asphaltum showing in the railroad gap in section 14 of 30-22, some oil sands—dry oil.

I have examined the shales or sands around McKittrick. The shales are practically the same as the shales in the Elk Hills. R. I-469.

*Parker Barrett*, oil operator, who located the ground on which the Lake View gusher well was drilled, testified:

I have been interested in lands in the Elk Hills. . . . I know of an oil seep in the northwest quarter of 32 of 30-24 and have seen it. . . . I had heard of this seepage a good many years. . . . That seepage assisted me in my knowledge in thinking that the lands were good oil lands. R. I-524.

He testified that just about where the railroad passes the gap, section 14 of 30-22, there are asphaltum beds and brea. R. I-526.

*F. O. Martin*, one of the Government experts, testified:

I found an oil seepage in the northwest quarter of section 32 of 30-24. That gas seepage is situated near a place where the anticline has been somewhat deflected, giving

the hydro-carbons a chance to exude to the surface. The existence of that seepage was plain evidence to me that the lands must be underlaid by petroliferous deposits. Further, having seen and examined the oil exudations to the west, near the town of McKittrick, I found that the formation underlying said oil seepages near McKittrick extended easterly to the Elk Hills, and that no break being visible between the formation at McKittrick going easterly to the Elk Hills was evidence to me that the formation must be the same,—that is, that the formations overlying the oil sands at McKittrick and the formations overlying the oil sands at the Elk Hills are the same. . . . I have observed seepages in the Buena Vista Hills as denoted on the map. These seepages are in sections 10 and 11 of 32-24. The formation of the Buena Vista Hills and the Elk Hills are the same. R. I-613, 614.

*Chas. W. Lamont*, occupation, mining and prospecting since 1897, testified that he went into the Elk Hills in 1899 with his partner, S. G. Drouillard, who was an old prospector and found indications of oil. The largest was a blow out on section 32 of 30-24.

We picked some of the shale and sand where the blow-out was in section 32. It was decomposed shale and there was strata of oil sand there, and the shale was very hot. . . . That formation after we got under the surface was very hot. In fact it was too

hot to handle pleasantly. The indications of oil there was just the oil sand and that shale we know goes with an oil formation.

On the north and along the line of contact from McKittrick towards Sunset right close to the lake, we saw live oil coming out of the ground, floating on the mud and water, towards the easterly and northerly end of the Elk Hills. R. I-580.

After seeing these indications of oil, I located seven sections of land right in what I took to be the anticline along there, and then I formed another company and located several more sections. I don't remember how many. The first seven sections located were located west-erly from section 32, the original discovery, and extended over to 30-23. . . .

I concluded that section 32, where the oil sand was, was the top of the anticline, I have seen indications of oil in section 14 of 30-22, where the railroad goes through. . . . It looked like oil sand and brea. It would be what I took to be the west end of the anti-cline at that time. R. I-581.

*Ira M. Anderson* testified that he was fifty-two years old and had been actively engaged in the oil business ever since he was fifteen or sixteen years old (R. I-154), and that he examined the Elk Hills in 1899 and 1900 and found there shale, gypsum, oil sand and brea:

I made chloroform tests of the earth and rock and shale that we found in the Elk Hills. The tests showed oil and oil sand. As to my opinion

as to whether or not the Elk Hills was oil producing territory, the formation was there to show that it was. The shale is there, the clay is there and the oil sand is there. I found blow-outs in the Elk Hills. There was a place across from Miller & Lux's headquarters where the gas blew out. . . . It was on the east side of the summit line of the Elk Hills, pretty near the top of the line or ridge of those hills. R. I-155-6.

*Dr. J. C. Branner testified:*

Near the middle of the northwest quarter of section 32-30-24 about on an anticline are oil seeps. . . . The seepage was important as an indication of what was underneath. R. II-1015.

*F. D. Lowe* testified that he went into the Elk Hills in 1900 for the purpose of making some oil locations. He had at that time heard of the discovery of oil evidences in the Elk Hills. Had heard various people speak of the blow-out in 32 of 30-24. Three hundred yards due north of the northeast corner of section 11 of 31-24 he found what appeared to him to look like oil sand in a gulch. He found a similar indication in the center of section 2 of 31-24 and a third indication half a mile east of the section line of section two.

These oil sands showed stains and looked as though they were very much dried. . . . We afterwards made locations. R. I-146.

He testified that they incorporated a company, levied an assessment and erected an eighty foot



derrick at the N. E. corner of section 11 of 31-24, near where he had made the first discovery.

We got down about five hundred and sixty feet and struck small showing of oil and at various times we got gas. We piped the gas . . . and cooked with it. R. I-147.

When the bit would come up, little drips of oil would break and run down in a little streak. I am certain that it was oil. R. I-150.

When we were down about five hundred feet we struck gas and we lit a paper and dropped it in the casing and when it reached down a few feet there was a terrific explosion. R. I-153.

I found the same character of formation in the five hundred and sixty foot well that we drilled out there on section 11 as in the Kern River Fields . . . where the wells were paying wells. R. I-147.

*J. I. Waggy* testified that in 1900 he discovered a seepage in section 32 of 30-24. It was a small outcropping of sand in the bottom of the canyon. He took some of the sand to H. A. Blodget of the firm of Jewett and Blodget, which had extensive holdings in the Sunset field and Blodget sent his superintendent and oil expert, W. E. Youle, to examine the seepage. On the strength of this discovery, Waggy, Blodget, Youle and others formed a company and located for oil a number of sections in the Elk Hills in 30-23, 31-23, 30-24 and 31-24, including the top of the hills, embracing the lands in suit. R. I-239-243.



*Chas. F. Haberkern* testified that he was engaged in the development and mining or prospecting of lands in the Elk Hills and vicinity and was a director and one of the original locators of the Eight Oil Company in which Josiah Owen and E. T. Dumble were stockholders. R. I-349.

In August or September, 1904, he went all over the Elk Hills with Owen.

I know of an oil showing, or out-crop, or gas blow-out, in the northwest quarter of section 32 of 30-24. At that time Mr. Owen and I visited that oil seep. . . . My associates and I, in pursuance of that examination made by Mr. Owen and me, later located lands in 30-23. We located the even numbered sections. The reason we didn't locate any odd numbered sections at that time, although I wanted to do it, when Mr. Owen and I went out again he said that he was working for the railroad company and not to take any railroad land. R. I-350.

*B. K. Lee* testified that he had been engaged in the oil business at McKittrick continuously since 1900 (R. I-224) and that "on section 2 of 31-23 there was an oil seepage" (R. I-225) and that—

there are asphaltum indications on section 14 of 30-22. On the north flank of the anticline on this section there is a bed of coarse gravel. . . . A superficial examination shows nothing but yellow gravel, but when you break into it, it is covered with dry oil. R. I-230.

A. C. Veatch, the Government expert, referring to the seepage or gas blow-out in section 32 of 30-24, testified:

I examined the seepage on two occasions and found a stained sand exposed at intervals for several hundred feet, on the west side of the gulch in which it is situated, and in one or two places on the east side. This sand contains some free sulphur. Tested with chloroform it gives no oil. The sand shows some carbon,—particles of carbon,—and it is my conclusion that it represents an escape (f gas from the oil-bearing zone, the gas carrying some oil with it; that this oil has been deposited in the sand together with sulphur coming from the gas and that it has been fired—the gas has been lit—and that owing to incomplete combustion a little carbon has been left in some of the sand, which makes it probable to my mind that any one or more persons in the past could have tested that and gotten positive results of oil, if the oil had not burned out. It would probably be also a volatile oil that would evaporate. If there were other earth movements, it would be possible, I think, at some future time, to get a positive test of oil. R. II-712.

While Veatch's test showed no oil in 1912, yet it corroborates the evidence of Youle (R. I-552), Farnum (R. I-496), I. M. Anderson (R. I-155-6), H. P. Dover (R. I-461), Barrett (R. I-480) and others that when they made their tests prior to the patent with ether, oil was found. The evidence estab-

lishes the fact that the seepage was often set on fire which burned out the oil owing to incomplete combustion and left particles of carbon, found in the sand by Veatch.

The defendants offered three geologists, Ochsner, Anderson and Taff, all of whom had been for a number of years in the employment of the Southern Pacific or its subsidiary companies, in an effort to show that the seepage in section 32 of 30-24 was not an oil seepage.

*W. H. Ochsner*, geologist of the Kern Trading and Oil Company and the Associated Oil Company, both subsidiaries of the Southern Pacific, testified:

I examined the occurrence to see just what its appearance might be and I came to the conclusion very rapidly that it was an organic occurrence and not an oil seepage by merely looking at it, from the relation between this formation and the close and impermeable strata exposed underneath. I did not burn it nor test it with chloroform. R. IV-2215.

*F. M. Anderson*, who went to work for the Southern Pacific in 1903, testified that when he was preparing for this trial, he first visited this seepage on 32 of 30-24 and he gave it as his opinion that it was "a gas seepage." R. IV-2474. "The gas is hydrocarbon gas and partly sulphuretted hydrogen gas . . . not necessarily petroleum gas. . . . Largely, I think, methane gas." R. IV-2474-5. He said he tested the sandy material with chloroform, benzine and other reagents and that the

chloroform and benzine showed no evidence of asphaltum, while the other solvent showed a dark stain in the solvent, which he couldn't explain. R. IV-2476-7.

*J. A. Taff*, assistant geologist of the Southern Pacific since 1909, testified that this blow-out was not a gas seepage, as Anderson had testified it was. Taff admitted that he was not a chemist and had the sand tested by his assistant, A. J. Heindl, who was not examined, and they got no perceptible indication of color in the chloroform indicating the presence of bituminous matter. It burned slowly but he couldn't see any indication of petroleum in the alleged seepage. R. V-2762. He admitted that natural gas usually is closely associated with petroleum and in part has the same origin (R. V-2836), and that methane gas forms the chief characteristic of natural gas. R. V-2828. This explains why Anderson could not say that it was not petroleum gas, but that it was "not necessarily petroleum gas."

*Chas. H. Allison*, one of defendants' witnesses, admitted on cross-examination:

I saw specimens of sands taken from the side hills and from the gulches and the canyons from the outcroppings in 30-23 and believed in the mineral and oil character of the land as prospects and I contributed money to set up the stakes and give notice of our claims upon the ground. Several of my co-locators went out on the land and placed the location notices

and after examining the land they returned and brought with them and showed me numerous specimens of bituminous rock and a mixture of that rock and asphaltum which, when a match was applied, burned indefinitely. R. III-2001.

*L. E. Doan*, another witness for defendants, admitted that there was an outcropping of oil sand in sections 26, 22, 16 and 15 of 30-23, and that "it extends three miles practically right on the outcrop." R. IV-2074.

*J. B. Treadwell*, who was in charge of oil development for the railroad from 1893 to 1903 and who recommended the withdrawal of lands from sale because of their probable oil contents, visited the seepage on 32 of 30-24 in 1899 and he said it "looked good" and he and John Jean and L. G. Sarnow located for oil on section 31 of 30-24 near the oil seep. R. I-128-9.

Treadwell made out the notices (R. VI-3426) and told L. G. Sarnow it was good for oil. R. I-135. He also told F. J. Sarnow he thought there was oil in the Elk Hills. R. I-165.

*Josiah Owen*, who was in charge of the railroad oil lands from 1903 to 1909, was dead at the time of the taking of testimony but the reports and maps made by him and the evidence of a number of witnesses establish the fact that prior to the patent he was well acquainted with the seepage on 32 of 30-24 and the other indications of oil in the Elk Hills and believed they were oil lands.

Owen's reports and maps have already been referred to as well as the testimony of S. P. Wible (R. I-321), Chas. Brisco (R. I-340) and others to the effect that each of them visited the seepage on 32 of 30-24 with Owen and that he expressed a favorable opinion as to the value of the lands in suit as oil lands.

The seepage or blow-out on 32 of 30-24 was so well known that the following witnesses for defendants admitted they had heard of it though they had not been to it; *E. J. Miley* (R. III-1742); *R. K. Howk* (R. III-1844); *B. M. Howe* (R. III-1906), and *Chas. T. Burks* (R. IV-2067).

The foregoing excerpts from the testimony conclusively establish, we submit, the existence of seepages, gas blow-outs, oil sands, brea, asphaltum and other indications of oil in the Elk Hills and on the lands in suit. The well known outcrop or seepage on section 32 of 30-24 while not on the lands in suit, is in the township in the Elk Hills lying just east of the lands in suit.

The existence of the foregoing seepages, oil sands, gas blow-outs, asphaltum and brea in the Elk Hills, indicated the presence of oil in the lands in suit, which lie in the very center of these hills. These conditions as well as their significance were well known prior to patent.

*W. E. Youle* testified:

In California the existence of oil sands is always a good indication of finding oil in paying quantities. I will make the statement

broad. You show me an oil seepage with a proper development and I will show you an oil field; and if you can find any instance it is not so, it is something I don't know of. From my experience in the California field, I will say that such an oil sand indication is always an indication of the presence of oil in paying quantities. I make that statement unqualifiedly and I know of no exception to it whatever. R. I-556.

W. H. Ochsner, one of defendants' geologists, testified:

A cropping of oil-sand is a beginning of first hand evidence that petroleum is present in the neighborhood and it is the first step in the study. It would call forth the first suspicion, the first interest. A cropping of oil sand which shows unmistakable evidence of having been impregnated by petroleum or bituminous matter is absolute evidence to the mind of any competent geologist that if oil does not exist in that formation now, it must have existed at some time in the past. That is unequivocally true. R. IV-2212.

Reference will now be made to the testimony showing existence of outcrops of oil bearing sands, seepages and other indications of oil, not in the Elk Hills themselves, but in the vicinity of the lands in suit.

(d) *Oil bearing sands, seepages, asphaltum and other evidences of oil in great abundance in the vicinity of the lands in controversy.*

Having considered the evidences of oil in the Elk Hills, attention will now be directed to the testimony

showing the indications of oil in the vicinity of the Elk Hills, that is, in the McKittrick, Midway and Sunset fields and in the Buena Vista Hills.

*Judge Dietrich* said:

The railroad Company's geologists, who were in the territory at various times during this period doubtless noted oil seepages and oil sand outcrops for many miles along the line of the McKittrick development and in several places along a line or zone westerly from the Midway field,

and that—

it is virtually conceded by the experts for the Railroad Company that in the McKittrick-Midway-Sunset zone it was known that there was oil in considerable quantities, susceptible to profitable extraction. R. VII-8.

Prior to patent there were 281 producing oil wells between McKittrick and Sunset, a distance of 30 miles, but before referring specially to the oil development, the Court's attention will be called briefly to the evidence showing the seepages, outcroppings of oil bearing sands and other indications of oil in that vicinity as they existed prior to the date of the assailed patent.

**McKittrick-Midway District.**

*Township 30-22:* McKittrick is in section 21 of this township which adjoins and lies west of the lands in suit. The Circuit Court of Appeals found that "particularly in the McKittrick field the presence of oil in large volume reasonably near the surface and economically susceptible to extraction was abundantly shown."



*Chas. Brisco* testified:

I first went to McKittrick in 1897 or '8 and I remained there until August, 1904. I know about the oil seepages or oil indications in and about the town of McKittrick and the hills there. Those indications consisted of oil running out of the ground and seeping, and gas pockets and places where the gas was bubbling up. When it would rain the gas would bubble up and oil would run out down the hill. I guess I noticed this around there in a hundred places. I also noticed evidence of waste of oil there in former times. There was what we called a Tar Flat . . . about half a mile south and east of McKittrick. R. I-335.

*H. M. Shreve* testified that he first became interested in oil properties near McKittrick in 1888 or 1889 (R. I-446), and that "in various parts of 30-22, right in the immediate vicinity of McKittrick, there are large showings of liquid asphaltum oozing from the ground." R. I-455.

*H. A. Blodgett* testified that he was "a pioneer" in the McKittrick, Sunset and Midway fields and made locations for the purpose of drilling for oil beginning in 1878.

These locations commenced northwest of McKittrick and extended three or four miles right down both sides of what is now McKittrick, right on down the strike Southeast. By strike I mean strike or outcrop, the strike or the break that was evidenced by oil seepage. These oil seepages were visible, very much in evidence and they extended for four

or five miles along the strike or break Northwest and Southeast. That was the general strike of the oilbearing formation through that country. R. I-361.

Witness helped organize in 1893 and was a director of the Standard Asphalt Company, a subsidiary of the Southern Pacific Railroad Company, which operated at McKittrick. R. I-363.

*Ira M. Anderson* described the places in the vicinity of McKittrick where he "found extraordinary evidences indicating the country to be an oil country" in 1899 or 1900. He found asphalt, oil, sand and gas on 34 of 30-22.

The sun would melt the asphalt and it raised up and in the center of it there would be gas coming up and if you lit it, it would come up like a candle. This asphalt covered over there for probably an acre. These conditions were known in general to the populace around there at that time. R. I-155.

He found deposits of asphalt all over the flat going east from McKittrick in sections 22 and 26 of 30-22 and similar deposits north of that in the Elk Hills. R. I-161-2.

*B. K. Lee* testified to outcroppings of oil sands on sections 8, 17, 18, 20, 28, 29, 34 and 35 of this township (R. I-224-5) and *S. G. Drouillard* on section 5 of this township. R. I-127.

*John Dean* (R. I-131), *F. J. Sarnow* (R. I-169), *C. F. Whittier* (R. I-470), and many other witnesses described the seepages, asphaltum and oil sands and other indications of oil in 30-22.

In reciting the testimony as to the evidences of oil in the Elk Hills, reference was made to the evidence of the seepage in the railroad gap in section 14 of 30-22, which section is at the northwest end of the Elk Hills (R. I-321) and a mile west of the lands in suit.

*Townships 30-23 and 30-24:* The testimony as to the indications of oil in 30-23, in which the lands in controversy are situated and in 30-24 lying just to the east was referred to in considering the evidences of oil in the Elk Hills.

*Townships 31-21, B. K. Lee* testified to the outcroppings of oil sand in this township and on the line of contact with the Temblor Range R. I-225.

*C. F. Whittier* testified to a large oil outcropping or seepage on sections 14 and 24 of this township. R. I-470.

*Township 31-22:* This township corners with the lands in suit on the southwest. *C. F. Whittier* testified as to an oil outcropping on section 19. R. I-470. *Ira M. Anderson* testified that he found asphalt and oil sand in section 2. R. I-155.

*W. E. Youle*, testified to a quite prominent seepage two and one-half or three miles southeast of the large seepage right at McKittrick. R. I-361.

*Township 31-24:* This township corners with the lands in suit on the southeast and is in the Elk Hills and reference has already been made to the testimony of *F. D. Lowe* as to the oil sands in this township and the well drilled by him on section 11 showing oil and gas which was used for cooking. R. I-146-7.

*Township 32-22:* This township is six miles southwest of the lands in suit. *C. F. Whittier* testified as to oil seepages on sections 1 and 2.

*Township 32-23:* This township is six miles south of the lands in suit. *S. G. Drouillard* testified:

I know of seeps in 32-23 near the corner of 23, 24, 25 and 26, in the Midway. That is where I located. We found great blocks of asphaltum there. We lifted some of them up and there was oil on the under side of them, seeping out. You could turn up a block of it and find the drips of oil. R. I-116.

*B. K. Lee* testified to outcroppings of oil sand on sections 21, 22 and 26 (R. I-225) and *C. F. Whittier* testified that there was an oil seepage on section 6 and "several others between there and Maricopa" (R. I-470), which is in the township south of 32-23.

#### **Buena Vista Hills.**

*Township 32-24:* The Buena Vista Hills cover a part of this township. *H. P. Dover* testified that he saw a gas blow out in 1900 on section 11, "two or three hundred yards long where it crops out" and the discovery of the gas blow-out influenced him in making a location there. R. I-462.

*Parker Barrett* saw a gas blow-out on this section (11) in 1901. R. I-525.

*B. K. Lee* testified that in 1903 Josiah Owen mentioned an oil sand cropping in section 11 and said that he found evidence of gas in eleven places in the Buena Vista Hills. R. I-230. Section 11 is near the big Honolulu well.

*C. F. Whittier* testified that in 1903 he found natural indications of oil in the Buena Vista Hills. Found a prominent cropping called a blow-out and he set it on fire and it burned two weeks. R. I-470.

*F. M. Anderson*, defendant's geologist testified in September, 1903, he and Josiah Owen went into the Buena Vista Hills as far as section 11 of 32-24 and examined various outcrops in that vicinity and made estimates of the thickness of the strata exposed about the Hills and noted the deposits in section 11 and took them to be deposits of asphaltum. R. IV-2403. Again in 1908 he visited these deposits and still believed them to be asphaltum but in 1910 when he was examining them for the purpose of this trial, he doubted whether they were. He said these deposits differed chiefly in quantity from the well known gas blow-out or seepage on 32 of 30-24. R. IV-2478.

**Sunset District.**

*W. E. Youle* testified that in 1890 he examined the Sunset Field, which is about fifteen miles south of the lands in suit and found springs of oil and outcroppings. There were seepages in many places along the line of contact with the Tremblor Range and around Sunset, the evidence of these was very plain from three to five miles and a great deal of money was invested there on his opinion. R. I-544-5.

*Ira M. Anderson* testified that in 1901 he examined the West Side fields:

The Sunset, McKittrick and what has since become the Midway Fields are all about the

same. I found oil sands all through there and oil seeping out of the ground and gypsum all through that country. Where you find gypsum you will find oil. I found that in Sunset. At that time they were producing oil in Sunset and McKittrick. Between McKittrick and Sunset the formation was about the same. There were these blowouts through there, asphalt and oil, and places where you could see what was asphalt around there and gas coming through the center of them. That condition extended generally from McKittrick to Sunset. R. I-154.

*John Jean* (R. I-131), *F. J. Sarnow* (R. I-169) and other witnesses testified to seepages in the Sunset Region.

*H. A. Blodgett* testified that in July, 1904, there was practically a continuous proven field from the southeast of Sunset to four or five miles Northwest of McKittrick barring a slip that would be now from Fellows to McKittrick. That slip is now proven territory. R. I-362.

Much other testimony could be recited to show the oil indications of the lands lying practically on all sides of the lands in suit but enough has been shown to demonstrate their oil character and these known geological conditions plainly showed that these lands were chiefly valuable for their oil contents.

This brings us to a consideration of the actual development for oil prior to the date of the assailed

patent on the lands from McKittrick to Sunset and also in the Kern River Field.

*(e) Oil development in the McKittrick, Midway, Sunset, and Kern River Fields prior to patent.*

H. A. Blodgett testified that on July 1, 1904, there was a continuous chain of wells from a point several miles southeast of Sunset up into the Midway and then there was a gap of two miles and then operations extended through McKittrick into the Temblor Hills. R. I-362.

The Government offered in evidence as Exhibits HA, HB and HC, the Barlow and Hill maps of the McKittrick, Midway and Sunset Oil Fields, published prior to August 31, 1904, giving a correct picture of the oil conditions in these Fields at the time (I-109), W. H. Hill testifying that "they are based on my personal visits to each and every claim." I-111. Two-thirds of these maps were sold in the oil fields in Kern County and some to the Southern Pacific Company. R. III-2033.

The Circuit Court of Appeals found—

that in the aggregate there were in these three fields (McKittrick, Midway and Sunset) in 1904 between two and three hundred wells (part of them producing) and particularly in the McKittrick field the presence of oil in large volume reasonably near the surface and economically susceptible to extraction was abundantly shown. R. VII-5.

These maps and other evidence show that 281 wells had been drilled from Sunset to McKittrick, a distance of about thirty miles. R. IV-2137.

The map, Exhibit HA, of the McKittrick Field shows twenty-two producing wells in section 20 of 30-22, one in section 27, two in section 28, seventeen in section 29, six in section 34.

These forty-eight wells are from three to four miles west of the lands in suit and there were many other wells in this township as well as in 30-21.

It will be recalled that Exhibit 157, being the map made in 1903 by Josiah Owen, the railroad geologist, shows an anticline running from section 6 of 30-22 through the lands in suit and Barlow and Hill's map, Exhibit HA, shows two wells on this section and Owen, in his report of March 25, 1903, to E. T. Dumble, transmitting Exhibit 157, said "producing wells ought to be found along this exposure."

The Kern River Field, east of the lands in suit, was developed in 1899, and at the time Barlow and Hill's map of this field, Exhibit HD, was published, contained several hundred producing wells. Owen was of course, familiar with this field and in his report to Dumble of March 25, 1903, he wrote:

I have traced the outcrop of the Oil Horizon all the way to Sunset Oil Field and find that there is but the one Oil Sand and I believe it will be possible to trace the same Horizon to the Kern River fields. There are several reasons for believing that they all belong to the same zone. R. III-1620.



(f) *The evidence demonstrates that the dip of the oil sands and strata exposed in the seepages and outcroppings for thirty miles along the oil development from McKittrick to Sunset is towards and under the lands in controversy.*

Having shown from the foregoing testimony the long line of seepages, oil sands and wells extending from McKittrick to Sunset, and just a few miles west of the lands in suit, the geological connection between these lands and the lands in suit will now be taken up and it will be demonstrated that the dip of the oil sands and strata exposed in the seepages from McKittrick to Sunset is towards and under the lands in controversy.

It will be conclusively shown that the oil horizon, that is, the oil bearing strata shown at the outcrop, passes through the lands in controversy, as in the *Diamond Coal* case "the coal horizon—meaning the coal bearing strata shown at the outcrop but not necessarily the coal—passed through the lands in controversy." 233 U. S. 246.

On this phase of the case, the opinion of the Circuit Court of Appeals stated:

The Railroad Company's geologists, who were in the territory at various times during this period, doubtless noted oil seepages and oil sand outcrops for many miles along the line of the McKittrick development and in several places along a line or zone westerly from the Midway field. From observations readily made they must have concluded

that underlying this zone there were shales in which it is supposed the oil originates, and beds of sand into which it migrates. They must have further concluded that the several uplifts are structural, that is, they are the results of a folding or of foldings of the earth's crust, and they would have known that such a fold or anticline is a favorable formation for the accumulation and retention of oil. They would have determined that the principal dip of the country is northeasterly, and the general trend of the fold axes is northwesterly and southeasterly. R. VII-5-6.

And further in that opinion it is said:

It is virtually conceded by the experts for the Railroad Company that in the McKittrick-Midway-Sunset zone it was known that there was oil in considerable quantities, susceptible to profitable extraction, and that an anticline such as is found in the Elk Hills is an occurrence favorable to the accumulation and retention of oil to which prospectors would hopefully look upon discovering the presence of oil in adjacent territory. They also concede that it then appeared probable that some oil would be found, but not in sufficient quantities or near enough the surface to warrant extraction and marketing. R. VII-8.

A. C. Veatch testified that along the east flank of the Temblor Range for many miles there are a series of porous beds and associated clays, well designed on the one hand to afford a reservoir for oil and on the

other hand to prevent undue leakage, and the seepages show the persistence of the oil saturation in these porous beds. R. II-701.

They dip, in a general way, towards the San Joaquin Valley. The general slope is interrupted by folds which are, roughly, parallel to the main fold of the axis of the Temblor Range, and, forming these folds, rise as groups of hills above the surrounding country, and their structural character is evident even to the most casual observer. R. II-702.

These folds which he referred to are the Elk Hills and Buena Vista Hills, which he described as "elongated domes of ideal structure for oil accumulation" and "both fall within the proven area from geologic determinations." R. II-702-3.

Mr. Veatch further testified:

If any corroboration were needed, . . . it is found in the seepages in the Buena Vista Hills and in the Elk Hills; and any questions which might arise with regard to the persistence of the oil, as shown by these seepages, are conclusively set aside by a great series of wells which had been sunk prior to 1904 down the dip from these seepages and connecting, showing that the seepages represented oil in commercial quantities. R. II-703.

At page 702 he stated that the seepages extended along the Temblor Range fifteen miles and the oil horizon extended eastward  $7\frac{1}{2}$  miles, but on page 719 he stated that his statement was an error and explained that the distances are thirty miles and fifteen respectively.

In my determination of the region at the time of the examination, I laid it off on a map on which the scale is approximately two miles to the inch. I measured it as fifteen inches and seven and a half inches and the note was made in inches and transposed to miles inadvertently. R. II-719.

*F. O. Martin* testified that having examined the oil exudations and seepages near McKittrick, he found that the formation underlying said seepages extended easterly to the Elk Hills and no break being visible in the formations going easterly was evidence that the formations overlying the oil sands at McKittrick and the formations overlying the oil sands in the Elk Hills must be the same. R. I-613-4.

*Dr. J. C. Branner* testified:

I should say that if any competent geologist, observing the natural waste of oil about McKittrick and the stage of development in 1900 or a year or two subsequent, and visiting the Elk Hills and making some examination of the structural formation, failed to form an opinion that the Elk Hills were oil in character and that there was an oil bearing zone underneath those hills, he did not understand his business. R. II-1004.

Additional excerpts from the testimony of Dr. Branner and others bearing on the geological deductions were made in this brief when considering (1) the analogy between coal and oil; (2) the anticlinal structure of the lands in suit; and (3) their situation with reference to the diatomaceous shales.

*W. E. Youle* testified that the formation at Sunset dipped into the valley and that the conditions around McKittrick were about the same as at Sunset. R. I-544-5.

The McKittrick side was dipping towards the Elk Hills and the asphalt at the McKittrick side had faulted and broken; but on the Elk Hills side it was not broken so much but folded up, and I made up my mind that there was a fountain head of oil for all this alike. R. I-579.

In 1893 C. P. Huntington and other officials of the Railroad visited McKittrick. Youle was at that time superintendent of the Standard Asphalt Company, a subsidiary of the railroad company. He drove Mr. Huntington around and they went on the west side of the Elk Hills and he explained to him that the formation was "dipping towards those Hills" and that he did not believe that that country was a "shoe string at all but it was a great big field." R. I-550-1.

*W. H. Ochsner*, one of the defendants' geologists and a former employee of the Kern Trading and Oil Company and the Associated Oil Company, both subsidiaries of the Southern Pacific, admitted that he first formed an opinion of the Elk Hills as a possible or probable oil bearing territory as a result of his work in 1907. R. IV-2203. He further admitted:

Assuming that there is a cropping of oil-sand showing at some date in the past the

waste of bituminous matter in the Elk Hills, and taking that assumption into consideration in connection with the correlation of the oil-sand outcroppings along the McKittrick front and down as far as Sunset where the valley makes a contact with the Temblor Range, I would say that the facts would be a strong element in favor of warranting a competent geologist to advise a man to invest money there with the hope of producing oil property, and I believe many competent geologists have advised the investment of capital on less evidence than that. R. IV-2211.

Ochsner testified that Josiah Owen said:

If there is a spindle top in California it is on top of the Buena Vista Hills. By that he meant that the dome was filled with oil (R. IV-2210), which would produce gushers in great quantity. R. IV-2213.

*E. T. Dumble*, in his letter of September 21, 1903, to Julius Kruttschnitt, enclosing maps showing the lands of the Railroad Company considered valuable for oil purposes to be included in the lease to the Kern Trading and Oil Company, wrote:

The attached maps shows these under three heads: first, oil lands proven or practically proven, colored red; very probably oil lands, colored green; probable oil lands, colored blue. Of the oil value of the first two classes there is very little doubt; the third depends in part upon the continuance of normal dips and conditions, but in addition, it represents untested anticlinals which show good indications of oil. R. V-2913.

Attention is called to the concluding part of this extract in which it is said that the oil value of the third class depends in part upon the continuance of normal dips and conditions. One of Owen's maps shows the dips from the East flank of the Temblor Range toward the lands in suit.

*Josiah Owen*, in his report of March 25, 1903, to E. T. Dumble said:

The fold north of the McKittrick and running nearly parallel passes through Sec. 5-9 between 11 & 15 through 13 of Town. 30, R. 22. This fold exposes the oil sands in several places and in some of the exposures the sands are strongly impregnated with Asph. and producing wells ought to be found along this exposure. R. III-1617 . . . In the direction of Midway I find that the McKittrick fold flattens out in the valley but other hills further on in the same direction would indicate that it may extend to near the Kern Lake. R. III-1617-8.

I have traced the outcrop of the oil Horizon all the way to Sunset Oil field and find that there is but the one Oil Sand and I believe that it will be possible to trace the same Horizon to the Kern River fields. There are several reasons for believing that they all belong to the same zone. R. III-1620.

These extracts from this report show that Owen knew the relation of the lands in suit to the seepages and oil sands extending from McKittrick to Sunset.

The Elk Hills anticline as traced by Owen, on Exhibit 157, "is the anticline or fold north of McKittrick and running nearly parallel." He predicted producing wells ought to be found along this exposure and Barlow and Hill's map of 1904 shows that there were two oil wells on section 6 of 30-22 through which this anticline runs and which continues on through the lands in suit.

## V.

**THE TESTIMONY SHOWS THAT EXPERIENCED, PRACTICAL OIL MEN GENERALLY BELIEVED, PRIOR TO THE DATE OF THE ASSAILED PATENT, THAT THE ELK HILLS WERE VALUABLE FOR THEIR OIL CONTENTS.**

In the *Diamond Coal* case the Court said (233 U. S. 245):

The expert for the Government proceeded upon the theory that, when the known surroundings are such that practical coal men would invest in particular lands for coal mining or advise others to do so, those lands are to be deemed coal lands, even though coal has not as yet actually been disclosed within their limits. And having in mind the outcropping coal bed, the direction and inclination of its dip, the character of the rocks with which it was interstratified, the quality and thickness of the coal at the outcrop, the proximity of the lands to the outcrop and the topographical and structural features of the vicinity, he gave it as his opinion that the coal bed extended into and through the lands in



question and that practical coal men would regard the lands as valuable for coal and invest in them as such. He accordingly pronounced them coal lands within his acceptance of that term.

The testimony shows that practical oil men and experienced operators, prior to 1904, generally entertained the belief that the lands in controversy were valuable oil lands.

*W. E. Youle*, who, the defendants in their brief filed below, admit "was one of the oldest and most experienced experts and operators," testified "my opinion was that that [the Elk Hills] was a prolific oil field and if I had had my way, I would have drilled there in preference to over at the McKittrick side" (R. I-569), and that he had no reason to change his opinion since. R. I-554-5. That he regarded the Elk Hills as a "great big field" as early as 1893 when *C. P. Huntington* visited that region and *Youle* gave him his reasons for believing it valuable oil land (R. I-550-1), and that he would have advised any company to furnish the money to the extent of \$50,000 or \$100,000 to develop the lands in controversy with the reasonable expectation of developing a paying oil property. R. I-577. *Youle* found oil sands in the Elk Hills and he made "a chloroform and fire test" and the result showed bituminous matter gases. R. I-552. He and his associates located for oil in 1898. R. I-551.

*S. G. Drouillard*, who had "mined most of his life" and who made locations in the Elk Hills in 1899,

testified that they were "generally regarded by competent oil men as oil territory in 1899" R. I-122, and "that they were supposed to be in the oil belt." R. I-124. Township 30-23, in the middle of the Elk Hills, was regarded by all the people as good oil territory. R. I-125.

*H. A. Blodgett*, a member of the firm of Jewett and Blodgett, which was part owner of the Standard Asphalt Company, a subsidiary of the Southern Pacific Company, was a pioneer in the West Side Oil fields and was one of the largest and most experienced operators in those fields. R. I-360. He testified that he believed that the indications in the Elk Hills were good and he and his associates made a number of locations in there in 1899, and kept them up for six years and spent a good deal of money on these locations (R. I-367), and intended to develop them. Youle was superintendent for many years for Mr. Blodgett's operations at Sunset and at McKittrick, where he was in charge of the Standard Asphalt Company. R. I-366.

*N. C. Farnum* testified that he had been almost continuously in the oil business in Kern County since 1899. Made a detailed examination of the Elk Hills in 1899. R. I-495.

I formed the opinion absolutely that the territory in the Elk Hills was oil territory at that time. I have had no reason to change that opinion since and still believe it to be oil territory. R. I-499.

He and his associates located lands at that time in the Elk Hills.

I know my associates did not, at that time, regard the land as merely a prospect; we considered it better than a prospect. We spent a good deal of money there, and a man don't usually spend a great deal of money on a prospect. We were assured in our own minds as well as we possibly could be without drilling, that it was an oil territory; and I still consider it as such. R. I-510.

Knowing all the conditions then existing, we would have sunk a well for the reason that we had determined to drill a hole in the Elk Hills no matter what it cost us, as far as we could go and as far as money would go. That was the absolute determination, not to be deviated from, until the Government withdrew the land. R. I-512.

*Frank Barrett*, sixty-seven years of age, has been in the oil business all his life. Brought in the first paying well in the Coalinga field. President of two companies and interested in others. Was employed in 1899 and paid \$100 per day and his expenses to examine the Elk Hills (R. I-478-9), particularly 30-23 (R. I-482), for a company that wanted to go in the oil business.

From my examination I believe these lands to be good oil bearing territory . . . .

I made a report on the land, and a favorable one in writing. I recommended the lands as good oil bearing territory and have had no reason since that time to change my opinion. R. I-480-1.

*Chas. M. Lamont*, occupation mining since 1879, testified that he examined the Elk Hills in 1899 with *S. G. Drouillard*, an old prospector, and located for oil several sections westerly from 32 of 30-24 and they extended over to 30-23.

I certainly regarded the Elk Hills country at that time as good oil territory and the only conclusion I have come to since then is that it was better than I thought it was in the first place. R. I-581.

The oil depression beginning in 1901 was the cause of their failure to develop the property.

*W. E. Ott*, Superintendent of the Southern Pacific's property at McKittrick beginning in 1901, testified that all of the time he was there and up to the present time "it was a general belief amongst oil men that the Elk Hills were oil territory" and that he "always thought there was oil there." R. I-277-286.

*L. G. Sarnow*, an experienced practical oil man who at one time was in charge of the Southern Pacific field at the McKittrick and later moved to Kern River and had charge of the field there, testified that he and *J. B. Treadwell*, examined the Elk Hills in 1899 and both thought the land was good for oil, though deep, and that they made locations. R. I-135.

*F. D. Lowe*, who drilled a well in the Elk Hills in 1901, testified he "talked with people that were in a position in which their opinion was worth something, . . . and that they believed there was oil there" and "in paying quantities." That was the opinion generally among men interested in the commercial

production of oil. R. I-149. The witness gave the names of several operators who entertained that opinion.

*B. K. Lee*, an experienced oil operator at McKittrick, testified that he recommended the purchase of 159 acres of land in section 36 of 30-23 for its oil value and it was purchased. R. I-229.

*C. F. Whittier*, one of the largest oil producers and operators and a practical prospector in this territory, testified that the total output of his producing wells was about a million barrels a year. R. I-469.

I believe the Elk Hills have value for mineral; for oil. . . .

I had talked with some personal friends of mine as to the situation and intended to go in there and make some locations and do development work and get a patent to the land, but I was unfortunately crippled so that I couldn't go over there then.

I am interested in the oil business from a producing standpoint and not from a speculating standpoint. R. I-471.

It was the general impression of the oil men of my acquaintance around McKittrick, as early as 1904, that the Elk Hills would become oil bearing—would be proven to be oil bearing. R. I-474.

From my observations of 30-24 and 30-23 and the Elk Hills generally, the conditions were such in 1904, or up to that time, to justify an ordinarily prudent man in the expenditure of money with the reasonable expectation of developing a paying oil property. R. I-476.

*Ira M. Anderson*, oil producer and prospector of wide experience, testified that he made chloroform tests of the earth, rock, and shale found in the Elk Hills in 1899 and 1900 and the tests showed oil and oil sands and the formation was there to show that it was oil producing territory. R. I-156.

Judge Dietrich, after quoting from the testimony of Dr. Branner, Frank Barrett and W. E. Youle, stated:

By "oil territory," it would seem to be clear that these and other Government witnesses mean territory where the observable geological conditions are such as to justify expenditures in prospecting, and prospecting by those who are able to take the chances. R. VII-15.

*Dr. Branner* testified:

I should say, decidedly, that the conditions in the Elk Hills are such as to warrant the ordinarily prudent man in the investment and expenditure of money with a reasonable expectation of developing a paying property. R. II-1 25.

This is an exact compliance with the test laid down in the *Diamond Coal* case that—

the known conditions . . . were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end. p. 239.

It is true that Dr. Branner said "there is nothing absolutely certain about putting down an oil well in a new region; there is a certain amount of risk about it." R. II-1025.

So in the *Diamond Coal* case, one of the witnesses for the Government said:

He could not take a "solemn oath" or "be positive" that unexplored lands in the vicinity of the outcrop and in the direction of the dip contained valuable coal, but his testimony said this court "was plainly to the effect that the outcrop, the direction and inclination of the dip, and other conditions in 1899 and 1900 afforded reasonable ground for believing that a considerable territory lying west of the outcrop could be mined profitably." p. 244.

Dr. Branner said that in forming his opinion:

I took into consideration the possibilities of the non-occurrence of oil resulting from the conditions of the sand and the pinching and hardness of the stratum and other interruptions. R. II-1024.

Likewise in the *Diamond Coal* case, the Government witnesses and the court took into consideration "the uncertainties incident to coal mining by reason of the faults, thinning and the like."

These uncertainties were emphasized by the Coal Company's experts and the Court recognized the fact and stated that coal mining has "its hazards and uncertainties," just as Dr. Branner said petroleum mining has "a certain amount of risk."

Dr. Branner was thoroughly familiar with the various kinds of mining and he testified that "next to coal mining, the mining of petroleum, based solely upon geologic evidences, was the surest kind of mining that I know anything about." R. II-1024. While *A. C. Veatch*, the noted expert, said that he did not know absolutely that underneath the dome of the Elk Hills there was oil in paying quantities, yet he "reached the conclusion that that was to me valuable oil land, that is, it had a commercial value as oil property," and that it was "a place where I would *certainly* advise drilling and where a man would be *amply* justified in spending money in drilling a well." R. II-743.

*Youle*, the most experienced operator, and *Whit-tier*, the largest producer, and others, testified, as we have seen, that they would have advised the expenditure of money in the development of the Elk Hills with the reasonable expectation of producing a paying oil property, and *Frank Barrett* recommended in 1899 in writing, the Elk Hills as good oil-bearing territory to a company that wanted to go into the oil business, and at that time the lands in suit were worth, in his opinion, as oil lands from \$200 to \$300 per acre, and aside from their oil value, "I don't think you could raise a black-eyed pea on them." R. I-481.

It seems clear that these witnesses entertained the belief that the lands in suit were oil lands as defined in the *Diamond Coal* case.



Space forbids further extracts from the evidence of the many witnesses for the Government who testified to their belief prior to the date of the patent, in the oil value of the lands in suit, and mere reference is here made to the evidence of some others of these witnesses, to wit: M. S. Wagy (R. I-174-180), J. I. Wagy (R. I-237-244), C. F. Haberkern (R. I-349-350), W. G. Sylvester (R. I-355-357), and H. P. Dover (R. I-461-468).

The defendants seek to draw comfort from Veatch's statement that in his opinion oil could not have been mined at a profit in the Elk Hills in 1904, but he explained that "there are a great many valuable deposits that cannot be mined at a given moment that are perfectly good mineral lands." R. II-886. That depends upon the price of oil at that particular time, the conditions of marketing, the matter of transportation and questions of economic features. R. II-887.

The evidence shows that during 1904 there was a great depression in the oil business in this territory, oil selling as low as seven cents a barrel and that there were no transportation facilities for independent producers, due in large measure to the preference in furnishing cars given by the railroad to its subsidiary, the Associated Oil Company. See references, *infra*, p. 182 *et seq.*

Judge Hook in his opinion in the Circuit Court of Appeals in the *Diamond Coal* case, 191 Fed. 786, 795, refers to this feature, saying—

the mineral must be in such quantities as to justify exploitation; but that does not mean a positive, absolute certainty which can only be shown by actual exposure or uncovering, nor that *temporary distance from market makes unprofitable* the mining of any but a very thick vein or deposit.

So in the instant case, a temporary depression in the oil business or a shortage of cars which rendered the mining of the oil unprofitable at that particular period would not prevent the lands from being classified as oil lands.

(a) *The belief in the oil value of the lands in suit was also entertained by the experts, officers and agents of the Railroad Company.*

Not only was the belief in the oil value of the lands entertained by practical oil men operating in the West Side Oil fields, but it was also shared in by the oil experts, responsible officials and agents of the Southern Pacific, evidenced both by their words and deeds.

*John R. Scupham* from 1874 to 1887 was consulting engineer of the Railroad Company and as such examined mineral lands (R. I-584-5), and in 1887 at the request of A. N. Towne, General Manager of the railroad, he examined the Elk Hills and reported that he "thought these hills lying to the east were overlaying the oil measures, and that they would

turn out to be very important in their future development" (R. I-588), and he also told Jerome Madden, the railroad land agent, that he thought that was going to be valuable land and suggested that they ought to have it surveyed and steps were taken shortly after that to have the land surveyed. R. I-589. The record shows that the survey of a part of this land was completed in 1893.

*J. B. Treadwell*, the railroad expert in charge of its oil development and operations, admitted that he had in 1902 withdrawn from sale "because in or near oil territory" sections 3, 5, 7, 9, 13, 14, 17, 31, of 30-23 and eight sections of 30-24 and several in 31-24. Treadwell also admitted that the above are all the sections in 30-23 which were at that time surveyed. R. V-3423-4.

The above admissions were secured from Treadwell toward the end of the taking of testimony, when he was called to the witness stand by the railroad. At the beginning of the trial, he had been examined as a witness by the Government and stated that "none of my withdrawal orders took any portion of the Elk Hills." R. I-435. When Treadwell was examined the last time he was confronted with Exhibit 115, being the withdrawal map which he had made showing the above sections in the Elk Hills reserved from sale "because in or near oil territory." While Treadwell said on the witness stand that he did not believe the Elk Hills oil lands, his act in withdrawing them from sale shows clearly his belief.

Treadwell in December, 1899, in conjunction with L. G. Sarnow and John Jean, located for oil, section 33 of 30-24. At that time he was oil expert for the Railroad Company and carrying on its operations in his own name and in May, 1902, the Railroad Company secured agricultural patent No. 111 for this section 33. R. VI-3451-9.

Treadwell and other associates also made other locations for oil in the Elk Hills in 1899. R. VI-3427. Jean and Sarnow both testified that before making the location of 33 of 30-24, Treadwell went to the seepages on 32 of 30-24 and he thought the land was good for oil. R. I-128, 135.

*Thomas J. Griffin*, General Manager of the Splindletop Power Company, and at one time mechanical engineer of the Rio Bravo Oil Company, a subsidiary of the Southern Pacific, testified that J. B. Treadwell in 1902 told him that he had made a careful examination of the Elk Hills and had found oil sands and indications of oil there, and asked witness if he would not like to ship a rig there and they would go in and develop for oil the even numbered sections as soon as the lands were surveyed and that Treadwell had a map showing the character of the land. R. II-1327-8.

*Josiah Owen* in September, 1902, took active charge of the oil territory of the Southern Pacific in California. R. V-2900. Owen reported to E. T. Dumble who succeeded J. B. Treadwell in March, 1903, as consulting geologist. R. V-2907.

Owen died before the suit was brought but the record is replete with evidence showing the belief entertained by him, prior to patent, that the lands in suit were oil lands. This evidence consists of his maps, reports, letters, statements and acts to which brief reference will be made.

*S. P. Wible*, an intimate friend of Josiah Owen (R. I-322) and associated with him in the formation of the Eight Oil Company, in 1907, to acquire lands in the Elk Hills (R. I-323), testified that he and Owen examined the Elk Hills together in 1903 or 4; Owen was going to show him the outcrop or seepage on 32 of 30-24. R. I-321. Owen seemed to feel sure that there were oil lands in the vicinity of those oil outcroppings on section 32. R. I-322.

Just about the time of the selection of those lands by the Railroad, about 1904, the same lying in 30-23, I discussed those lands with Mr. Owen. We were at that time discussing the mineral probability of the hills for Fuller's earth especially. . . . He said if the railroad selected those lands they would be selecting mineral lands. In other words, they had no right to select them as he had reported them as mineral land. R. I-324.

I had some conversation with him with reference to some land in 30-23, in which he told me that oil could be reached at three thousand feet or over and we didn't drill because we didn't figure that it would pay to drill for it. R. I-328.

From 1903 to 1908 the oil business in the McKittrick vicinity was very dull and there

was practically no new developments on account of the price of oil and lack of facilities for getting rid of it. R. I-333.

*Charles Brisco* testified that in 1903 he took *Josiah Owen* to a brea bed in the Elk Hills and they lighted it. R. I-335. Owen made a careful examination of the Elk Hills and told Brisco that it was good oil territory and that "he thought that would be the best territory of any of it, but would be very deep. R. I-337. Witness had some land located in the Elk Hills and he asked Owen about it and Owen said "This is good enough, hang on to it." R. I-341. *F. O. Martin* testified that in February, 1912, he made a trip with Brisco into the Elk Hills and Brisco pointed out the lands he and Owen had gone over together in 1903. Martin testified that the oil seepage Owen and Brisco examined was on section 32 of 30-24 and the sections traversed by them were 24, 26, 33 and 34 of 30-23, and 29, 30 and 32 of 30-24. R. I-343-5.

*N. C. Farnum* testified that he met *Josiah Owen* in 1903 and accused him of taking from him section 27 of 30-22 which he had located in 1899. It had recently been patented to the Southern Pacific Railroad. Owen said Treadwell was responsible for that. Witness was then at work on 26 and he asked Owen what he considered the prospect of getting oil in 26 of 30-22 and Owen said:

Your section 26 is better land for development than 27, according to his opinion. He stated he thought the whole country from

30-22 clear to the lake was oil territory; as he had examined them carefully. That would include townships 30-22, 30-23, and 30-24. R. I-508.

We discussed the general trend of the Elk Hills. I asked him whether he thought we would likely get oil, and he said "Yes"—I don't know his exact language. He said something about the depth we would have to go but I can't say what it was now. I am not sure whether he said it was three or four thousand feet. I think he said it would be deep. R. I-521.

At that time witness and his associates were in possession of their location in 30-23 (R. I-522), which they had made in 1899 in consequence of the report of W. E. Youle and Mr. Farnum's personal observations, and they had also purchased some locations in this section from S. G. Drouillard and his associates. R. I-501.

*M. S. Waggy* testified that during the time Josiah Owen was making examinations of the Elk Hills, he showed him the sand taken from section 32 of 30-24 and later had a talk with Owen about that country and Owen said he thought that was an oil district. R. I-182-3.

#### Eight Oil Company.

The Eight Oil Company was organized in 1909 but the lands were first acquired in December, 1907, and January, 1908. The holdings include the following even sections in 30-23, to-wit: 20, 22, 24, 26,

28, 30, 32, and 34 in 30-24. Its development has been confined to 30-24. Among the incorporators were Josiah Owen, 8,000 shares, S. P. Wible and C. F. Haberkern. R. I-347-9.

*C. F. Haberkern* testified that in consequence of the examination made by him and Owen in 1904, he and his associates later located lands in 30-23. They located only even sections because Owen said "he was working for the railroad and not to take any railroad land. R. I-350. Perhaps a month before we made our locations in 1907 we talked the matter over with Mr. Owen and he said to locate on the even sections in 30-23." R. I-353.

*S. P. Wible* testified that Owen furnished information of the geological character of the holdings of the Eight Oil Company to that Company and told them that it was possible that the oil measures lay under there at a depth that could be reached.

Mr. Owen put up his share of the money for doing the development we did there and the locations of the land and the organization of the Company. Those lands were located for oil, Fuller's earth and gypsum and other minerals. R. I-324.

After the Eight Oil Company was organized Owen got 2667 shares of stock for E. T. Dumble. R. I-351.

*Capt. W. H. McKittrick* testified that he first met Josiah Owen in 1899 and on his advice, invested in some property in Texas which did not turn out very well; that he next met Owen in Oakland in 1903 and at that time Owen said:



I am awfully sorry about our investment down there but I have something that I will put you on that will make you more money than the mine we might have had in Mexico. I asked him what it was and he said he was not at liberty to tell me then, but would tell me when the proper time came. R. I-527.

That he met Owen again in Bakersfield in 1907 and "he said then that he was ready to put me on to what we were talking about in 1903."

*He told me that he had been working out in the Elk Hills for a number of years, and that no one knew he was out there at all, and he told me to say nothing about his being out there.* R. I-528.

That he had located large deposits of Fuller's earth and—

he told me that there might be a possibility of oil there, but that oil could not be found within less than 3,400 feet, but he could not tell whether it was in paying quantities or not, but that he believed that oil was there at that depth. . . .

I can't say that it was my understanding at that time that that depth was prohibitive. Mr. Owen didn't say anything to me about the depth being prohibitive. He said he had been out there so many months, and that he didn't think there was any chance of oil in less than 3,400 feet, that there might be oil at that depth. He suggested the location for Fuller's earth, and did not say that it was for the purpose of getting the oil. R. I-535.

They located the even sections in 30-23 and 30-24 and the Eight Oil Company was organized, and Capt. McKittrick became interested in it. While he understood they located for Fuller's earth, Mr. Wible, who was one of the active men in the organization of the Company, testified the lands were located for oil as well as Fuller's earth. R. I-324.

It is indeed singular that the company should have been named the Eight Oil Company, if it was not organized to produce oil, but Fuller's earth. At the time of the trial, a contest was pending in the local Land Office over a part of these lands in 30-23, the Associated Oil Company contending that they are oil lands. The experts of the Associated Oil Company testified at the contest that it was not Fuller's earth. R. I-530. Oil has been developed there. R. I-531-2. None of the Fuller's earth was ever sold. R. I-352.

The estate of Josiah Owen has received dividends amounting to \$15,225 on his stock in the Eight Oil Company and E. T. Dumble has received in dividends \$20,502.53. R. I-348.

The foregoing declarations and acts of Josiah Owen conclusively show that he believed the lands in suit were oil lands in 1903 and 1904. If any corroboration were needed, it is found in the reports and maps which Owen made soon after he began his investigations of the oil fields in September, 1902.

Quotations have already been made from his report to Dumble of March 25, 1903 (R. III-1615-20), in

which he refers to "the fold north of the McKittrick and running nearly parallel, passes through sections 5-9 between 11 and 15 through 13 of 30-22," which without doubt meant the Elk Hills anticline which shows on his map, Exhibit 157, accompanying said report, as entering township 30-22 in section 6 and extending through the lands in suit. In said report, he says, producing wells ought to be found along this exposure.

The Southern Pacific Railroad Company in 1904 had a patent to section 31 of 30-23, and in making up a list of the lands of the Company to be transferred to the Kern Trading and Oil Company for the production of oil for the railroad, section 31 was included in this list with the approval of Owen, Dumble and F. M. Anderson, the Railroad Company's experts. This section adjoins the lands in suit, for which Eberlein, the land agent, was endeavoring to secure an agricultural patent and it was on this account that he refused to execute the lease, writing to General Manager Markham on September 10, 1904, "should the existence of this lease become known it would go a long way toward establishing the mineral character of the lands referred to and which are still unpatented." R. II-1056.

*E. T. Dumble* became head of the geological department of the Southern Pacific in March, 1903, and in charge of oil operations, succeeding Treadwell. R. V-2907-11. Owen reported to him. Both Dumble and Owen were furnished with copies of Tread-

well's map, Exhibit 115, withdrawing from sale a large part of the lands in the Elk Hills because in or near oil territory. Owen sent to Dumble with his report of March 25, 1903, the map delineating the Elk Hills anticline, extending through the lands in suit. Dumble selected in conjunction with Owen and F. M. Anderson the lands to be conveyed to the Kern Trading and Oil Company for oil production purposes, which included section 31 of 30-23, section 5 of 31-23 and section 25 of 30-22, adjoining the lands in suit. *Geo. A. Stone*, who made up the selection list for the lands in suit testified that Dumble pressed the selection of these lands in the fall of 1903 "for reasons best known to himself. I supposed, as geologist, he thought they were oil lands. . . . I regarded the selection of these lands as irregular." R. II-1030.

When the lease to the Kern Trading and Oil Company was presented to Eberlein to sign on behalf of the railroad, he declined to sign it and advised Judge Cornish of his reasons (R. II-1075), saying that the pendency of the selection list was a very urgent reason for delaying the execution of the lease. Dumble was furnished a copy of this letter and on October 5, 1904, wrote to Eberlein asking for a conference and this was held on October 8th and on December 7th Dumble wrote Acting General Manager Bancroft "I have had a conversation with Mr. Eberlein and it seems for reasons of policy regarding certain unpatented lands that it will be best not to execute

the lease of lands between the S. P. R. R. Co., and the K. T. & O. Co. at present." R. II-1072. In 1907 Dumble wrote Eberlein a letter to refresh Eberlein's recollection as to the facts surrounding his refusal to sign this lease, in which Dumble used this language:

Early in December we had a further conference on the matter and you explained that you were rushing certain lands for final patent and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you and we agreed to defer the execution until that danger passed.

Asked what he meant by this, Dumble testified:

The danger that I referred to was just as I stated; danger of interfering with him and the danger that these lands might be delayed and not be patented because of their mineral character. R. V-2986.

Dumble testified that he determined the lands which they believed to be oil lands, owned by the Southern Pacific, that should be turned over to the Kern Trading and Oil Company.

That included other lands than those which were actually developed by wells. The Company owned everything that we thought at that time would be capable of producing oil commercially; I don't mean capable of producing oil commercially at that time. Most of the land was quite a way from any producing wells, and it was taken up with the idea of furnishing the Company with oil for a long period. R. V-2911.

He included 31 of 30-23 in the lands which he thought would be capable of producing oil commercially. This section adjoins the lands in suit. This shows plainly, we submit, that at that time Dumble also believed the lands in suit would be capable of producing oil commercially just as section 31 adjoining in the same township, and that "these lands were valuable for oil purposes" as he wrote Mr. Kruttschnitt on September 21, 1903, when recommending "that the Kern Trading and Oil Company should acquire by purchase or lease such lands now belonging to the Southern Pacific Company as we consider valuable for oil purposes." R. V-2913.

The lands in suit were not then owned by the Railroad Company and that was the only reason they were not included in the list of the lands that Dumble, Owen, and F. M. Anderson believed "valuable for oil purposes."

*Thomas J. Griffin* testified that E. T. Dumble told him while they were in Texas, both working for the Rio Bravo Oil Company, in the spring of 1904, that "California was the coming oil field and that they owned a great deal of that land and a great deal they hadn't yet taken patents on, but expected to." Griffin further testified that in the same spring while he and Dumble were riding together just north of Bakersfield, Dumble pointed to the West and said "right over yonder about 30 miles is the biggest oil field in the world. . . . We have large holdings and expect to have more." R. II-1330-1.

While Dumble claims that he did not personally examine the Elk Hills, Eberlein protested that Dumble and his men keep off of unpatented lands. R. II-1098.

Dumble was, as we have seen, a large stockholder in the Eight Oil Company which had large holdings in the Elk Hills and he received a dividend of \$20,000 on his stock. R. V-3049.

*C. W. Eberlein*, the acting land agent, who made the affidavits, probably had no personal knowledge of the oil character of the land. The record is clear that he was careful not to become informed, because he swore that he protested against Dumble and his assistant geologists examining unpatented lands as there was no co-operation between the land department and the geological department and if the lands were examined geologically, the Company would be fixed with knowledge and the geologists would be witnesses against the Company in any contest which might arise and so he made the affidavits without having the lands examined, at the same time swearing that he had caused them to be carefully examined.

Eberlein did, however, know that the lands he selected adjoined the oil territory for he wrote D. A. Chambers on December 10, 1903, as follows: "I am particularly anxious in regard to this list as the lands adjoin the oil territory and Mr. Kruttschmitt is very solicitous in regard to it."

Again in August, 1904, when the lease was presented for his signature, containing the list of oil lands to be

leased to the Kern Trading and Oil Company and he examined it and found that it included lands adjoining those for which he was attempting to secure patent, he declined to execute the lease, as the two acts would be inconsistent, and he advised that knowledge of the railroad's conduct in classifying the adjoining lands as oil lands be kept from the government. His advice was followed and he proceeded with his application for patent, filing it three days later, knowing that the geological department regarded section 31 of 30-23 as valuable for its oil, while he was representing to the government that the lands adjoining section 31 were not oil lands.

The Eberlein correspondence shows also that Julius Kruttschnitt, Vice-President in charge of oil matters, was actively interested in securing the assailed patent, "that he was very solicitous in regard to it." R. III-1577.

On September 21, 1903, Dumble wrote a letter to Kruttschnitt referring to untested anticlinals and enclosing maps. At that time Dumble had received Owen's map, Exhibit 157, enclosed with Owen's letter of March 25, 1903. This map shows untested anticlines and it is the only map offered in evidence which shows this and it is one of the maps sent by Dumble to Kruttschnitt. Kruttschnitt claims not to have received this map but only produces one map which he says he received and that is Exhibit 156.

A few days after this letter of September 21, 1903, from Dumble to Kruttschnitt, we find several letters



and telegrams passing between Eberlein and Kruttschnitt in reference to getting a patent to the lands in controversy and on October 12, 1903, Chambers wrote Kruttschnitt that Eberlein expected to tender a selection list for lands in 30-23 and suggested that Kruttschnitt ask that special attention be given to the patenting of those lands. He also advised Kruttschnitt that the lands in question were suspended from disposal upon allegations that they contained petroleum. R. III-1474.

*F. M. Anderson's* employment as a geologist for the Southern Pacific began in 1903. He assisted Owen in preparing the list of oil lands to be included in the Kern Trading and Oil Company lease, which embraced 31 of 30-23, which was as far from the outcrop as the lands in suit, yet he testified that the lands in suit were too far away from the outcrop to be commercially productive. R. IV-2455.

He testified further:

My conclusion as to the likelihood of the Elk Hills being then or ever being oil territory was negative. That is to say I did not believe they were oil-bearing or ever would be found to be oil-bearing, at least not in paying quantities—not commercially oil-bearing.”  
R. IV-2454.

It must be borne in mind that this is the expert upon whom the defendants mainly rely and according to his theory no land can be classified as oil land

unless a well has been drilled on the land and oil produced in paying quantities for a definite period of time. R. IV-2548. Measured by this standard, he could very readily say that the lands in question were not oil bearing.

*(b) The Southern Pacific was induced to build the branch railroad from Bakersfield to McKittrick because of the belief in the oil producing character of the country tributary thereto.*

*H. A. Blodgett testified:*

I remember when the Southern Pacific Railroad Company was put into McKittrick. I had something to do with the proposition of putting it in there. The inducement that promoted the construction of the road was the prospect of a profitable traffic that was to come out of the production of asphalt and oil in that district. I think the road was put into McKittrick in 1893. At that time I was operating an asphaltum business in the vicinity of McKittrick. I interested the Southern Pacific Railroad Company people through Henry F. Williams. . . . I took the matter up with the railroad authorities, particularly Mr. A. N. Towne, the general manager. I had a number of interviews with Mr. Towne and visited him several times at San Francisco. I helped to organize the Standard Asphalt Company. I would say that the Standard Asphalt Company was one of the subsidiaries of the Southern Pacific Railroad Company as it was organized to acquire

property that was to be conveyed in consideration of the building of that railroad. . . . One half of the stock of the Standard Asphalt Company was owned by Mr. Jewett and myself and the other half by the Pacific Improvement Company representing the Southern Pacific Railroad Company. The railroad was put there in pursuance of these arrangements about the organization of the Standard Asphalt Company in the transferring of the stock and has been operated ever since. The right of way from Bakersfield to McKittrick was obtained by Mr. H. Williams and me. . . . The future probabilities of that district or the country tributary to the Southern Pacific branch into McKittrick as an oil producing and oil shipping community figured largely in the inducements which lead to the putting of the road in there at that time. The portion of the road from Lokern to McKittrick was built to furnish transportation for the production of oil and asphalt from that McKittrick field. The probabilities of a great production of oil and shipment of oil in the future from that district was understood by the railroad officials as an inducement to get them to build a road through there as I had personally brought that matter to Mr. Towne's attention. I told Mr. Towne that the deposits of asphaltum in evidence in that district was a drop in the bucket only to the quantity of oil that was tanked underneath and that would be produced. In other

words the visible evidence of tonnage was as nothing practically, compared to what was underneath. R. I-363-5.

W. E. Youle testified that a short time before the branch road was built he made a report to the railroad officials on the country, stating that it was very fine looking oil territory and he was then asked to go to San Francisco where he met General Manager Towne, and other officials and reported his conclusions to them.

I was very much in favor of the field, and had reason to feel very sanguine that it would make good territory. . . . That road was commenced very soon after that. I-546-7.

(c) *The fraudulent manner in which the Southern Pacific acquired patent to the lands involved in the Tulare Oil Company contest is in keeping with its fraudulent conduct in securing patent for the lands now sued for.*

This contest is entitled *Tulare Oil and Mining Company v. Southern Pacific R. R. Co.*, and is reported in 29 L. D. 269.

To sustain the contention that the Elk Hills were not generally believed, prior to patent, to be oil lands, the defendants in their brief filed below cited this case, saying "this general opinion that the oil territory was very limited even received *official recognition* in 1899." It will be shown that this "official

recognition" was procured by the Railroad Company entering into a secret agreement to conceal from the Government the fact that the land for which it was seeking an agricultural patent was proven oil land.

The contest grew out of an application for patent filed by the Railroad Company for several sections in 30-22 near McKittrick. A protest was filed by the Oil Company, alleging that the lands were mineral. A hearing was held and upon appeal the decision of the Secretary of the Interior was in favor of the railroad. In the meantime the Oil Company had brought in a producing well and was about to ask to have the case reopened. The Railroad Company was advised of the discovery of oil and of the purpose of the Oil Company to reopen the case. Thereafter a secret agreement was entered into between the parties, by the terms of which the Oil Company agreed not to ask to have the case reopened and to permit the patent to be issued to the Railroad Company for the lands, upon the railroad agreeing to make a deed for a part of the lands to the Oil Company as soon as the patent was secured and that a deed to this effect should be placed in escrow, and this was accordingly done and the deed signed by H. E. Huntington, President of the railroad, is dated February 21, 1900. The patent was issued to the Railroad Company May 21, 1901, and the deed delivered to the Oil Company and recorded June 7, 1901. The foregoing appears from the evidence of H. M. Shreve, one of the organizers of the Oil Com-

pany and its secretary at the time of those negotiations. I-446.

It is needless to say that this agreement was kept secret and that the Government had no notice of it until it was brought to light in this litigation.

The fraudulent suppression of the agreement made it possible for the Railroad Company to secure a patent to lands which were mineral, the Oil Company having at that time drilled a producing well upon one of the quarter sections which was in controversy, and it was in consequence of knowledge of this fact that the Railroad Company entered into the fraudulent arrangement that if the Oil Company would not ask for a review of the decision of the Secretary of the Interior, but would let the Railroad Company secure a patent to this proven mineral land, it would deed the land upon which oil had been produced to the Oil Company.

A decision obtained from the Land Department by such nefarious methods instead of being a recognition of the non-mineral character of the land is convincing proof of the fraudulent intent which actuated the railroad in its dealings with the government in its efforts to obtain patents for the lands in this territory. It did not hesitate to suppress evidence and conceal from the Government the mineral character of the land for the purpose of securing an agricultural patent covering well known mineral land. It resorted to these methods and secured its patent in 1901 for

lands near those involved in this suit. It is not surprising that we find the same company resorting to similar means of misrepresentation and concealment two years later in its effort to obtain a patent to lands of the same character. This shows that the same underlying motive actuated the railroad and such evidence is clearly competent upon the principle that where the fraudulent intent of a party is at issue, proof of similar fraudulent acts, whether prior or subsequent to the act in question, is admissible.

*Wood v. United States*, 16 Pet. 342, 360; *Mudsill Min. Co. v. Watrous*, 61 Fed. 163; *Penn Mut. Life Ins. Co. v. Trust Company*, 72 Fed. 413.

In the *Diamond Coal* case, commenting on an earlier fraudulent effort on the part of the Coal Company to acquire the lands, the court said that it "serves in no small degree to explain the kindred practices employed in the later effort." 233 U. S. 248.

## VI.

### **MINERAL LOCATIONS MADE IN THE ELK HILLS PRIOR TO PATENT COVER EVERY SECTION OF THE LANDS IN CONTROVERSY.**

An abstract of the locations for oil made in the Elk Hills prior to patent, will be found in condensed form on pages 1652 to 1696 of volume three of the printed record. These abstracts cover pages 600 to 786 of the volume of "Documents and Evidence not Printed."

The locations cover every section in 30-23 from section 14 to 36, both inclusive, except section 31, for which the Southern Pacific had patent and they also cover sections 29, 31 and 33 of 30-24, which were located by J. B. Treadwell and other employees of the railroad.

These locations were made, beginning in 1899 and covering the intervening years before the issuance of the patent and were promptly recorded in the public records of Kern County. It was contended in the brief filed by defendants in the Circuit Court of Appeals that these locations for oil were made by men "without knowledge of the habits of oil" and that practically all the locators of "these speculative claims were men without experience in the oil business" and it was therefore argued that these locations meant nothing.

A reference to the names of these locators demonstrates that this contention is without support, but on the contrary these locators included the most experienced and practical oil men, including operators, prospectors and drillers. Among the locators were W. E. Youle, S. G. Drouillard, H. A. Blodgett, C. W. Lamont, M. S. Wagy, N. C. Farnum, L. G. Sarnow, F. J. Sarnow and Chas. Brisco.

The defendants admit that Mr. Youle was "one of the oldest and most experienced experts and operators," and the long practical oil experience of the others is shown by extracts from the testimony already incorporated in this brief.



In addition to the above, there were many others of more or less experience who were witnesses for the Government.

Among defendants' witnesses, who were among the locators and were or claimed to be experienced oil men, were J. B. Treadwell, H. W. Thomas, C. H. Allison, C. A. Barlow, Timothy Spellacy, and others. D. Burkhalter, division superintendent of the Southern Pacific at Bakersfield, was one of the associates of J. B. Treadwell in his locations.

The extensive practical experience in the development and production of oil of the foregoing men refutes the contention that their locations were for speculative purposes. It is true that some of the locators were inexperienced in oil matters but their activities no doubt resulted from the fact that they learned that the most experienced oil men, led by Youle, Drouillard and Blodgett, were making locations for oil, coupled with the fact that J. B. Treadwell, the oil expert of the Southern Pacific and in charge of its oil operations, had likewise made locations.

Colon F. Whittier, one of the largest oil producers in California at that time, the output of his wells being about a million barrels a year, testified that he was interested in the oil business from a producing and not from a speculating standpoint and that while he made no locations in the Elk Hills, he had made arrangements in 1903 to do so throughout township 30-24, but an injury to his knee kept him confined

to his house for several years and that prevented him. I-471.

From my observation of 30-24 and 30-23 and the Elk Hills generally, the conditions were such in 1904 or up to that time, to justify an ordinarily prudent man in the expenditure of money with the reasonable expectation of developing a paying oil property. I-476.

*The failure to develop the locations made in the Elk Hills between 1900 and 1904 was due: (1) to the depression in the oil business which occurred in 1901 and continued for several years; (2) to the inadequacy of railroad transportation; (3) to the withdrawal order of February 28, 1900; and (4) to the lack of money on the part of some of the locators.*

The defendants contend that the fact the locations made in the Elk Hills, beginning in the winter of 1899-1900 were not developed prior to the issuance of the patent in this case in 1904, shows that they were speculative and not made in good faith with a view of developing oil. An examination of the testimony shows that this contention is unfounded and it clearly appears that the failure to proceed with development work was due: First, to the depression in the oil business which occurred shortly after the first locations were made and continued for several years; second, to the inadequacy of transportation facilities which became acute about that time, due in a large measure to the fact that the Associated Oil

Company, which was furnishing oil to the Railroad Company, was given priority and practically all the tank cars available were furnished to that Company and independent producers could not get cars; third, to the suspension order of February 28th, 1900, withdrawing the lands from disposition, which was not removed until 1904, and lastly, to the lack of funds on the part of some of the locators.

*N. C. Farnum*, one of the largest oil producers and operators, testified that he and his associates, upon his own observations and Youle's report, made a number of locations in the Elk Hills in 1899 and they also paid \$3,200.00 to four locators (R. I-502); they built roads and a camp and kept from one to twelve men there.

Our object in making these locations was to acquire land for development, as we sincerely anticipated doing. We made arrangements to carry out our purpose in actually drilling for oil. R. I-503.

He testified that they had instructed Mr. Youle to move a complete drilling outfit from Kern River to Elk Hills to prepare for drilling but they were prevented "because the Government had just withdrawn this land" (R. I-503), and this "made it impossible for us to know whether we would ever get a title if we got a well." R. I-510.

Knowing all the conditions then existing, we would have sunk a well for the reason that we had determined to drill a hole in the Elk Hills no matter what it cost us, as far as we

could go and as far as money would go. That was the absolute determination, not to be deviated from, until the Government withdrew the land.

In 1902 there was a very perceptible depression in oil. There was a great shortage of cars. . . . The lack of railroad transportation and facilities had something to do with the general depression of the oil business. R. I-504.

It was easier to get cars in 1900 than in later years. It seemed that the injection of the Associated Oil Co. into the oil proposition in Cal. affected the transportation business materially, as they were buyers of oil as well as shippers. R. I-512.

He testified that they kept up their locations until 1906 but they didn't go ahead after the withdrawal was removed in 1904, because conditions changed, particularly between 1901 and 1906.

Money was hard to get. The price of oil was so low it did not pay to produce it. The transportation conditions were inadequate. R. I-512.

There was a long period there when it was almost impossible for a man who was not connected with the Associated Oil Co. or some of the other—one or two—of the larger corporations, to get cars to handle his oil. That was one of the reasons why our company determined not to sink a well after the government removed its restriction. Another reason was a lack of money. R. I-513.

*S. G. Drouillard* testified:

The order of withdrawal of the lands from disposition was a consideration for my leaving. R. I-125.

*H. A. Blodgett*, the most prominent oil operator in the West Side fields in 1900, testified that there was a considerable oil boom in Kern county in 1899 and 1900 and the excitement kept up for three years and was shared in by geologists and experienced oil men; but two factors, the low price of oil and lack of cars for transportation,

made the marketing of oil practically prohibitive. Oil could not be produced profitably and investors lost interest. That practically paralyzed that region and developments ceased. R. I-366.

Before 1902 the Railroad Company was buying oil of all producers in all fields in Kern county but in 1902 there was a change in affairs. The Associated Oil Company was delivering large quantities of crude oil to the Railroad and they "took precedence over everything else." R. I-366.

This change caused a lack of facilities for transportation, shortage of cars, and made it practically prohibitive for the shipment of oil out of the West Side Field and the River Field for independent producers. R. I-370.

Mr. Blodgett testified that he intended to develop his locations in the Elk Hills but—

the conditions of the oil business were such that it would have been ridiculous to have

spent any money during that entire period extending from 1902 to 1905 or 1906. R. I-389.

The reasons for not developing the property in the Elk Hills was that there was no market for oil. The price was so low that if you had had a thousand barrels a day in the Elk Hills you could not have transported it, it wouldn't be worth a cent. R. I-390.

He testified that the shortage of cars "was a symptom of a desire not to furnish the facilities." R. I-396. The Southern Pacific painted off the letters "S. P." on the tank cars and put on "A. O." The Associated was the only producer that could get tank cars. R. I-401-2. It will be recalled that the Associated Oil Company is a subsidiary of the Southern Pacific. R. VI-3592.

*S. P. Wible* testified:

From 1903 to 1908 the oil business in the McKittrick vicinity was very dull and there was practically no new developments on account of the price of oil and lack of facilities for getting rid of it. It was only once in a while you could get cars and for that reason you couldn't contract for the oil. The activity stopped almost entirely. The lowest I know of oil being sold for at that time was eleven cents a barrel. R. I-333.

*Chas. Brisco* testified:

There was a depression in the oil business in McKittrick, I think, in 1901, 2 and 3, and

it continued a year or two after I went away from there in 1904. During the time that I was there, I was actively engaged in the business of prospecting and development. The cause of the depression was our inability to get rid of our oil. We couldn't sell and we couldn't get it out of the field because there were no facilities for transportation. R. I-338.

This car shortage was quite general. He had charge of the shipping for a while and applied to J. B. Treadwell for cars and he said he didn't have any. R. I-339.

*B. K. Lee* testified that they drilled a well into the oil sand about the time the slump came in the price of oil about June, 1901. From then until the winter of 1903 things were very quiet. The price of oil would not justify the expense of putting in a pipe line. R. I-231.

*L. G. Sarnow* testified that he abandoned his location "because oil went down to nothing. It sold in the Kern field for seven cents a barrel and there was not enough money in it to drill for it." R. I-142.

*F. D. Lowe*, who drilled to 560 feet in the Elk Hills and "encountered oil, quit because of depression in the price of oil and financial difficulties." He quit in the early part of 1901, and the depression continued for a long time thereafter. R. I-151.

*Chas. W. Lamont*, testified "there was an oil depression from 1901 lasting for several years, and it was just as good as insulting anybody to ask them to

put their money into it at that time. That was the whole reason for our failure to try to influence people there or get money to carry out the locations." R. I-583.

*W. E. Youle* testified:

Money was spent on the location made on my recommendation in the Elk Hills; they built roads and did assessment work. They intended to go in there and I got a rig ready to send over, and some way they fell down. They said money was getting scarce, and oil was cheaper and transportation hard to get. R. I-576.

*W. G. Sylvester* testified that while he believed the land he located to be oil lands susceptible of development and production on a commercial basis, the low price of oil made the attempt to produce oil then too expensive. He drilled a well in 1901, 980 feet on Section 8 of 30-23 but he abandoned the well, "because there was so much gas that the drilling became so expensive that he couldn't stand the pressure." R. I-357.

*H. P. Dover* testified that his locations in the Elk Hills were abandoned "because of the slump in the oil business in Kern county in 1901 and oil was kind of a drug on the market for two or three years. Nobody would put any money in oil property." R. I-467.

A number of defendants' witnesses corroborated the plaintiff's witnesses as to the depression in the



oil business and lack of railroad facilities resulting in a failure to develop the locations in the Elk Hills.

*S. J. Dunlop* testified that in 1900 he put a well on each quarter of section 26 of 32-23, made discoveries of oil and obtained patent. "After that there was quite a slump in the oil business and we let the property lie until a railroad had been built in there." R. III-1820.

*L. B. McMurtry*, a railroad conductor for the Southern Pacific, testified that "in 1901 oil was down to 15 cents a barrel and there was no market and no transportation, and the oil industry certainly fell off considerably at that time." R. IV-2082.

*C. H. Meves* testified that after the drop in the price of oil at McKittrick, he lost interest in his locations in Elk Hills. R. III-2006.

*O. E. Hotchkiss* testified that "oil went down to twelve and fourteen cents a barrel and there was hardly any profit in producing oil even if you had a well already drilled. Development was checked." R. IV-2092.

*E. J. Miley* testified that he stopped drilling in 1903 because of the low price of oil and that in 1904 the oil business was bad, and he quit drilling and abandoned his location after getting some oil. R. III-1707-11.

## VII.

**THE GOVERNMENT PRIOR TO PATENT DID NOT DETERMINE OR ADJUDICATE THAT THE LANDS IN SUIT WERE NONMINERAL.**

*Judge Bean held that "these proceedings [which resulted in relieving from suspension the lands in suit] were in no sense an adjudication but a method adopted by the department for determining whether its previous order of withdrawal should be revoked and the lands opened to entry. They did not establish the non-mineral character of the lands nor relieve the company from the consequences of submitting false and misleading affidavits and proof upon which the land officers were expected to and no doubt did rely in issuing patents." R. I-79.*

It was contended below by the Railroad Company that the Government investigated the mineral character of the lands when the order was made relieving the lands from suspension and thereby adjudicated that they were non-mineral and to quote its brief "cannot be heard to say it was imposed upon by false representations."

The facts bearing upon this contention will now be reviewed:

It will not be denied, as Judge Bean finds that—  
at the time the selection list was first filed [in November 1903], the lands in controversy together with a large area of other lands were within a previous withdrawal order of the department because of their probable oil contents. At the request of the defendant

Company the department ordered an examination of the lands applied for by a special agent to ascertain whether they should be relieved for suspension, and upon his report the suspension order was revoked as to these lands and they were subsequently patented to the defendant. R. I-78.

The evidence shows [said Judge Bean]—

that the agent making the examination and report was not an oil or mineral expert and was instructed by his superior in the Land Office "that it would be unnecessary to go over all the lands but to drive over part of them just as the 'crow flies' and to interview ranchmen, stockmen, etc., as to the location of oil wells producing oil in paying quantities" and "to recommend that those lands be relieved from suspension on which he found no oil well producing oil in paying quantities," and that he acted accordingly, and made no examination whereby he determined or could determine whether in fact the lands were mineral in character. In his report he said that he "found no oil seepages, oil springs, or other indications of oil or mineral of any kind that would tend in his opinion to warrant" the lands being classified as mineral in character, and therefore recommended that they be relieved from suspension. R. I-78-9.

*E. C. Ryan* was the special agent who examined the lands and he testified that he was not a geologist or mineralogist (R. III-1598) and that he would not know a gas blow-out if he should see one. R. III-1605.

*E. C. Finney*, of the Land Department, who handled this matter testified that "there was no attempt to send a person with special scientific qualifications to determine the character of the lands." R. III-1587.

The above quotations in Judge Bean's opinion are taken from the evidence of *E. C. Ryan* at pages 1597-9, Volume III.

Ryan further testified that he "did not make any geological determination of any kind as to their mineral character" (R. III-1598) and that he "never got any instructions either orally or written from the General Land Office to determine specifically the mineral or nonmineral character of these lands." R. III-1601.

In reference to his first report made on January 22, 1904, and quoted by Judge Bean, he (*Ryan*) testified:

I said in my report that I made a careful examination of these lands, because I had made a careful examination as to any oil wells that might have been there. That is all. I did not examine the land with reference to oil seepages or oil sands. As I said before, I did not go all over the land and I did not see any. I looked for them but I did not see any along the road over the land that I did go over. R. III-1599.

Ryan on March 22, 1904, made a general report and in reference to township 30-23, embracing the lands in suit, he reported:

No wells have been bored for oil and in my opinion all the lands in this township should be relieved from further suspension. R. III-1600.

Ryan was the only person who examined the lands with a view of relieving them from suspension. They included about 25 townships. R. III-1598. The officials of the Railroad Company were well acquainted with Ryan, knew that he was not qualified to pass upon the mineral character of the lands and they requested, as we shall see, the General Land Office to have the lands examined by Ryan in order to get them relieved from suspension and restored to their former status so that they would be open to selection under the railroad grant. In addition to the instructions given to Ryan and quoted in Judge Bean's opinion, the General Land Office, under date of December 10, 1903, gave the following instructions to Ryan in reference to the examination of the lands in suit:

You are accordingly directed, when you make examination of the lands first described to also examine the tracts just enumerated and to promptly thereafter submit report as to whether or not in your opinion same should be relieved from suspension. This office has no available force from which to assign you assistance at the present time. With this condition of affairs in view, you will make report based upon the examinations heretofore made, your knowledge of the lands remaining to be exam-

ined, and familiarity with the country generally as to whether in your opinion there is any necessity for the continuance of the suspension of the lands in the Visalia, San Francisco and Los Angeles land districts suspended by this office in 1900, and not reported upon, a list of which you have. R. III-1548.

These written instructions were prepared by E. C. Finney and bear his initials. R. III-1586. He testified that:

My purpose, and that adopted by the Commissioner when he approved the letters directing the examination to be made, was to obtain general information, derived from a general examination of the lands and from whatever knowledge Mr. Ryan might be able to acquire or had already acquired. The Commissioner could not, and did not attempt, under the practice then prevailing, to adjudicate the character of lands upon a special agent's investigation and report. Our purpose, and his purpose, was to obtain general information to guide him in restoring the lands to general disposition, so that desert land claimants, forest lieu selectors, mineral claimants, or any other qualified citizens or corporations might apply to select or enter the land under the applicable laws, upon submitting the proof of the character required by the law and regulations. There was no attempt to adjudicate the character of any particular tract of land in any of these letters which I prepared, or with which I had to deal at this time. R. III-1586-7.

Finney further testified that after revocation of these suspensions:

I know it was the practice and requirement of the Land Office that such entries and selections should be accompanied and supported by usual proofs as to the character of land and compliance with the law; the revocation of a suspension was regarded and treated as a restoration to the former status. R. III-1587.

From the foregoing it is clearly shown that "these proceedings were in no sense an adjudication but a method adopted by the department for determining whether its previous order of withdrawal should be removed and the lands opened to entry" as Judge Bean held. While the first selection list was filed in the local land office on November 14, 1903, it was rejected on November 17, because the lands were suspended from disposition and the Railroad Company did not file its appeal to the General Land Office until December 11, 1903. R. VI-3767.

The request by the Railroad Company for the examination of the lands with a view of getting them relieved was made on November 30, 1903, and the order of instructions to Ryan as to their examination was made December 10, 1903, and before the appeal was taken.

So it is clear that the proceedings to remove the order of suspension were not had in the appeal from the rejection of the selection list. No appeal was pending in the General Land Office when the instructions were issued to Ryan to examine the lands

with reference to the removal of the order of suspension nor had any appeal been taken or filed at that time in the Local Land Office from its order of rejection of the selection list. Indeed, D. A. Chambers, the Railroad Company's Washington attorney, on December 16, 1903, wrote W. F. Herrin, General Counsel, upon receipt of Herrin's letter advising that an appeal had been taken, that it did not seem advisable to him "to take steps to get a hearing" on the appeal, as the Commissioner had already instructed special agent Ryan to examine and report as to the necessity for the continuance of the suspension. R. III-1483.

The revocation of the previous order of suspension merely had the effect of restoring the lands to the status they occupied previous to their withdrawal from disposition. The nonmineral character of the lands was not established thereby. Though it is contended by the railroad that the withdrawal order was of no consequence, because it was not based on any real determination of the intrinsic character of the land, yet it is strenuously argued that its revocation was conclusive determination by the government that the lands were nonmineral. The railroad officials were thoroughly acquainted with Ryan. They knew that he was not a geologist and not qualified to determine the mineral or nonmineral character of lands. They knew the order revoking the order of withdrawal was based upon a hasty and superficial examination by Ryan and its only effect was to make the lands open to selection.



Eberlein testified that he never saw Ryan or had any communication with him (R. II-1161-2) and this evidence is emphasized by the railroad in its brief filed in the Circuit Court of Appeals. This testimony was given before the production of the letter of December 10, 1903, from Eberlein to Chambers in which Eberlein discussed the best method of inducing Ryan to make a report on the lands in question, saying "it is a matter for serious consideration as how to approach him." R. III-1579. In his letter of September 3, 1904, to Cornish protesting against the execution of the lease to the Kern Trading and Oil Company, "as this would practically fix the mineral status" of these lands, Eberlein said:

I have just succeeded in getting the special agent in charge [Ryan] to make a report releasing our land from interdictment. I have worked very hard and very steadily to get the United States to complete its report and dispose of this matter. R. II-1079.

The Railroad Company in its brief in the Circuit Court of Appeals in undertaking to answer Judge Bean's finding that Ryan was not an expert, while in effect conceding that the finding is correct, says "he was the man selected by the Government to make this examination" and "there is no evidence that his designation to make the examination or his report was procured or influenced in the slightest degree by the railroad company." This is a remarkable statement in view of the evidence just quoted from Eberlein's letter in which it appears that he and

Chambers were conferring as to the best way to approach Ryan and Eberlein's positive statement that he had "worked very hard and very steadily" and had finally "succeeded in getting Ryan to make a report" releasing the lands from interdictment.

The evidence shows that the plan of having lands which were under suspension examined by a special agent with a view of relieving them from suspension was suggested to the Land Department by Chambers, the railroad attorney. This request was first made October 7, 1903, as to lands in 32-25 and as to a part of section one of 30-23. R. III-1539.

Not only was the Railroad Company active in procuring Ryan's report after he was appointed, but Chambers' letters show that his designation to make the examination was earnestly desired by the railroad. Chambers wrote, under date of October 12, 1903, that he could "ask the Commissioner of the General Land Office to direct special agent Ryan to examine the lands" selected by Eberlein "as quickly as possible" (R. III-1476), and on December 10, before he had been "advised positively," Chambers wrote Eberlein that "I presume the Special Agent is Mr. Ryan." R. III-1482. He presumed this because he had asked that Ryan be designated. It is thus apparent that the attempt of the railroad to disassociate itself from any connection with Ryan's appointment, or with his report is flatly contradicted by the record.

The defendants further say that the Government made other examinations as to the character of the

lands in suit besides the superficial and hasty investigation which Ryan made with a view of furnishing information as to whether the order of withdrawal should be revoked. They refer to an examination and report made by Jay Cummings, a special agent, dated July 13, 1900, but his report did not have anything to do with the lands in suit, but with lands near McKittrick in 30-22 and in 31-22 and in some other townships far removed from the lands in suit. R. VI-3868. Reference was also made below to certain reports made by Geo. H. Eldridge and published in the Reports of the Geological Survey. These reports did not deal with the lands in suit but were confined to the McKittrick-Sunset District. The record is clear to the effect that the only examination which was ever made of the lands in suit by any government agent, prior to patent, was that made by E. C. Ryan with a view of furnishing information to the Commissioner as to whether the lands should be relieved from suspension and thereby restored to the status occupied before the order of suspension was made. The purpose of the Commissioner in ordering the examination to be made by Ryan—

was to obtain general information to guide him in restoring the lands to general disposition so that desert land claimants, forest lieu selectors, mineral claimants, or any other qualified citizens or corporations might apply to select or enter the land under the applicable laws, upon submitting the proof

of the character required by the law and regulations. R. III-1587.

(a) *The Patent was Issued in Reliance Upon the Nonmineral Affidavits of Eberlein.*

The contention was made below that the Department in issuing the patent relied upon the report of its own employe as to the character of the land and not upon the affidavits accompanying the selection list.

This contention is based upon the above examination and report made by Ryan in connection with the issuance of the order revoking the order of suspension of February 28, 1900. This contention we submit is without merit, and Judge Bean's conclusion was sound that the proceedings resulting in the revocation of the order of suspension—

did not establish the nonmineral character of the lands nor relieve the company from the consequences of submitting false and misleading affidavits and proof upon which the land officers were expected to, and no doubt did rely, in issuing patents. R. I-79.

The nonmineral affidavits which the Railroad Company submitted with the selection lists were required by the rules of the General Land Office. They were an essential part of the proofs required to be submitted and were the only evidence or proof as to the nonmineral character of the lands, submitted to or considered either by the local or the General Land Office. They were made and filed for the purpose of securing the patent. The patent could not issue until

and unless the Land Department decided upon the proofs submitted that the lands were nonmineral. The affidavits were filed for the avowed purpose of inducing this decision.

*Geo. W. Stewart*, the local Register at Visalia, with whom the selection list was filed, testified that there was no evidence at all offered or considered by him during the pendency of this list as to the mineral or non-mineral character of the lands except the affidavits of Eberlein, and that was all that he forwarded to the General Land Office. R. VI-3784-5.

*E. C. Finney* testified that during his entire service, from 1894 to 1909, in the General Land Office, that office adjudicated—

*ex parte* cases, selections or entries, upon affidavits and other proofs submitted by the entrymen or selectors in accordance with the law or regulations governing that particular class of cases. In cases contested by other individuals or corporations, or by the Government, it was the practice to order hearings or trials, at which the testimony of witnesses might be taken, reduced to writing, and thereafter passed upon by the Land Department. R. III-1584.

In a case where there was no contest, he testified:

The General Land Office, in acting upon the selection or entry, would not base that action upon the agent's report, but would base its action upon the entry or selection and the accompanying proofs, that is, the proofs submitted by the entryman or selector in support of his filing. R. III-1584.

That after lands were relieved from suspension, it was the practice and requirement of the Land Office, that such entries and selections should be accompanied and supported by usual proofs as to the character of land. R. III-1587.

On cross-examination Finney testified:

Speaking of the effect given by the General Land Office to the report of any special agent, in the absence of a contest, and ordinarily on a contest, the Department in making its decision on an application for land, decided the same upon the proofs submitted by the applicants, giving no weight to the report of the special agent. R. III-1592.

After the lands had been restored to disposition, as in this case, the withdrawal orders had been revoked, the lands became just like other lands, similarly situated, subject to application or entry under appropriate laws, and the applicant or selector or entryman would have to submit the ordinary proofs required by the laws and regulations and applicable to that particular kind of filing; in all, or practically all, non-mineral filings one of the proofs required to be submitted is a non-mineral affidavit; other proofs might be evidence of publication of notice of the selection for filing. R. III-1593.

The foregoing evidence, and there is none to the contrary, shows that there is no foundation for the contention of the defendants that the Department relied upon Ryan's report in issuing the patent. On

the contrary, the Department in reaching its decision acted upon the proofs submitted by the applicant, giving no weight to the report of the special agent, in the absence of a contest, as in this case.

The evidence already quoted shows affirmatively that the patent was issued in reliance upon the proofs the railroad company submitted in the form of the nonmineral affidavits or Eberlein and that this was the only proof before the Land Office. But in the absence of such evidence, the presumption would be practically conclusive that the land officers did rely in issuing the patent upon the affidavits which were submitted for this purpose. It does not lie in the mouth of the Railroad Company to say that the proof which it submitted for the purpose of securing favorable action, and which it intended and expected the land officers to consider and accept as true, was not in fact relied upon, after it has secured favorable action and obtained the patent. This is unquestionably true in the absence of a positive showing on the part of the Railroad Company that the nonmineral affidavit was not relied upon as the sole cause or one of the inducing causes for the issuance of the patent.

A man who has made a false representation in respect to a material matter, must, in order to rely on the defense that the transaction was not entered into on the faith of the representation, be able to prove to a demonstration that it was not relied on. *Kerr on Fraud and Mistake* (3d ed.), 75.

It is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. . . . In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation or because the alleged facts did not influence his action at all. And the burden of proof is on the person who has been proved guilty of material misrepresentation. *Pollock on Torts*, 292. *Griffin v. Lumber Company*, 140 N. C. 514, 521.

Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere *existence of opportunities* (italics author's) for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact. *Pomeroy Equity Jurisprudence* (3d Ed.), sec. 895.

(1) *The representation need not be the sole inducement.*



In *Hindman v. Bank* (C. C. A.), 112 Fed. 931, Mr. Justice Lurton held that the false representation need not be the sole inducement moving the plaintiff.

It is not necessary that the plaintiff should have relied exclusively upon defendant's statements that they should have been the sole, or even principal, inducement to plaintiff's change of situation—but if they exerted a material influence upon his mind, although they constituted only one of several motives which, acting together, produced the result, it is sufficient. 20 *Cyc.* 41.

It is well settled that if a false representation is made and relied upon and is a material inducement, it can make no difference that other motives or causes contributed. If the party to whom a false representation is made to induce him to enter into a contract does so partly in reliance upon such representation, he is entitled to relief on the ground of fraud, though he may also reply partly on an examination or investigation by himself or by others for him. 14 *A. & E.* 113-5.

In *Sioux Nat. Bank v. Norfolk State Bank*, 56 Fed. 139, the Circuit Court of Appeals for the 8th Circuit held (syllabus):

In an action to recover for false representations made by defendant as to the financial condition of a merchant, whereby, plaintiff alleges, he was induced to make loans to such merchant, resulting in losses, it is not a defense that plaintiff also made some other examination and inquiries, for the action may

be maintained if the false representations were a material, though not the sole, inducement to make the loans.

The Court said (p. 141):

It is well settled that a false representation may entitle a party to maintain a suit even though it was not the sole cause of the bargain or transaction out of which the injury arose. It is enough to entitle a plaintiff to recover if the false representation complained of was a material inducement to the contract or transaction which occasioned the injury, although there may have been other cooperating inducements.

#### VIII.

**THE PROCEEDINGS RESULTING IN THE PATENT WERE EX PARTE, NO ISSUE WAS FRAMED, NO HEARING WAS HAD AND THE PATENT IS NOT CONCLUSIVE AGAINST THE GOVERNMENT BUT IT MAY CANCEL THE PATENT BY SHOWING THAT IT WAS OBTAINED BY MEANS OF FALSE AND FRAUDULENT PROOFS.**

The defendants in their brief filed in the Circuit Court of Appeals contended that "the patent is conclusive as to the nonmineral character" of the land.

The testimony in reference to the issuance of the patent has already been reviewed and it shows that the proceedings resulting in the patent were entirely ex parte, no protest was filed, no issue was framed nor was any hearing had, but the Land Office accepted the proofs submitted by the railroad, which consisted solely of the nonmineral affidavits of Eberlein and the patent was issued in reliance upon these.

The following cases show that defendants' contention that the issuance of the patent conclusively established the nonmineral character of the lands is without support.

*Washington Securities Co. v. United States*, 234 U. S. 76; *United States v. Minor*, 114 U. S. 233; *McCaskill Co. v. United States*, 216 U. S. 504, 509, and cases cited. The same principle is announced in the *Diamond Coal* case, 233 U. S. 236, 239.

*The Nonmineral Affidavits were Actionable.*

It was contended by the Railroad Company in the brief filed in the Circuit Court of Appeals that "its nonmineral affidavit on information and belief was a mere statement of opinion and not actionable." There are two conclusive answers, we submit, to this contention.

First, there were two affidavits attached both to the first selection list, filed in November, 1903, and to the last selection list, filed in September, 1904, and while one of the affidavits stated that to the best of Eberlein's knowledge and belief none of the lands returned in the list are nonmineral lands, the other affidavit attached to both lists stated that the lands, "are not interdicted mineral or reserved lands and are of the character contemplated by the grant." This was a positive, affirmative, substantive representation that the lands are not mineral.

Secondly, as it was the duty of the railroad to make a careful examination of the lands as to their mineral character before making selection, its affida-

vit setting out that such careful examination had been made and that to best of affiant's knowledge and belief, none of the lands were mineral, made and filed for the purpose of inducing the land officers to find that the lands were nonmineral, is actionable, if the lands were in fact mineral, and a careful examination would have revealed their mineral character, but no such examination was made.

It was further contended in defendants' brief that "the railroad did not make any misrepresentation as to any matter of fact."

This contention is predicated upon the theory that a representation that land is nonmineral is not a representation of a fact, but only the expression of an opinion.

The defendants first contended in this case that the affidavit was not false because petroleum was not a mineral and this position was taken in the face of the repeated rulings of the Land Department which are referred to in *Burke v. Southern Pacific R. R. Co.* 234 U. S. 669, 678, in which it is said that since 1873 "the Department has regarded petroleum as a mineral and has treated lands chiefly valuable therefor as mineral lands."

Having lost on this contention, they now seek to avoid liability on the ground that although the representation was false, it was but an expression of an opinion and not actionable.

We submit that a representation as to the character of land is a representation of a fact; that the quality of land is a fact. Indeed, the defendants in

their brief on the facts, filed in the Circuit Court of Appeals, in discussing Judge Bean's finding that the lands in suit were known oil lands, use the following language: "Mineral quality is a fact. In order to be known it must exist." How, then, can it be contended that a representation that the lands were non-mineral in quality is not a representation of a fact?

Numerous cases have been before this court in which patents have been canceled because of fraudulent representations as to the mineral character of the land. One of the latest cases is the *Diamond Coal* case which was a suit to cancel patents issued under the homestead law upon soldiers' additional entries. Each application for entry was accompanied by "an affidavit that there was not to affiant's knowledge any deposit of coal or other valuable mineral in the land and that it was essentially nonmineral." The Court said—

the affidavits were made and submitted as proof that the character of the lands applied for was such that they properly could be acquired under that law. The land officers accepted the affidavits and the statements therein as true and allowed the entries and issued the patents. 233 U. S. 238.

The case turned upon the question as to whether the representation that the land was nonmineral was false. The Court said:

Questions of fact . . . such as whether lands sought to be entered are mineral or non-mineral are committed to the land officers for determination; and as their decision must rest

largely or entirely upon proofs outside the official records, it is possible in *ex parte* proceedings . . . for applicants, by submitting false proofs to impose upon those officers. . . . A patent secured by such fraudulent practices . . . may be annulled in a suit by the Government against the patentee.  
p. 239.

The proofs submitted in that case were the non-mineral affidavits. They were submitted, as in the case at bar, to prove the lands were non-mineral and therefore could be acquired under the homestead law. The Court found the lands were mineral and ordered the patent annulled.

To the same effect is *Washington Securities Co. v. United States*, 234 U. S. 76, wherein four patents were canceled on the ground that the patentee fraudulently procured them upon false representations as to the character of the land.

## IX.

**THE DEFENDANTS WHO ARE TRUSTEES IN DEEDS OF TRUST EXECUTED PRIOR TO THE ISSUANCE OF THE PATENT ARE NOT PURCHASERS FOR VALUE OF THE AFTER-ACQUIRED PROPERTY AND THE LIEN THEREON IS SUBORDINATE TO THE RIGHT OF THE GOVERNMENT TO CANCEL THE PATENT FOR FRAUD ON THE PART OF THE PATENTEE.**

The defendant, Southern Pacific Company, is a corporation of Kentucky and operates the railroad under stock ownership and lease from the Southern Pacific Railroad Company. R. II-1344.

The defendant, Southern Pacific Railroad Company, is a consolidation under date of March 10, 1902, of the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona and the Southern Pacific Railroad Company of New Mexico (R. II-1360), and is the successor in interest of the Southern Pacific Railroad Company mentioned in the granting act of 1866 and the joint resolution of 1870. R. I-28.

The defendants, Homer S. King and James K. Wilson, are trustees under a deed of trust executed by the Southern Pacific Railroad Company bearing date April 1, 1875, securing the payment of \$46,000,000.00 of bonds.

The defendant, Central Trust Company of New York, is trustee under a deed of trust executed by the Southern Pacific Railroad Company and the Southern Pacific Company, bearing date September 15, 1893, securing the payment of \$58,000,000.00 of bonds and said Trust Company is also trustee under a supplemental trust deed, bearing date August 18, 1898, amending the said former trust deed of September 15, 1893. R. I-25.

The defendant, Equitable Trust Company, is trustee under a deed of trust dated January 3, 1905, which the other defendants aver is not a lien upon the lands involved in this suit. R. I-26.

The defendant, Kern Trading and Oil Company, is a subsidiary of and owned by the defendant Southern Pacific Company, being organized and conducted as its fuel department.

The deeds of trust which it is claimed are liens upon the lands in suit were executed before the Southern Pacific Railroad Company acquired its patent to said lands. So that when the deeds of trust or mortgages were executed the trustor or mortgagor did not own the lands but their acquisition in the future was merely contemplated.

The title therefore of these after-acquired lands is subject to all liens and equities valid against the mortgagor. The mortgagee stands in the shoes of the mortgagor and is in no sense a purchaser for value.

*United States v. New Orleans Railroad*, 12 Wall. 362, 365; *Fosdick v. Schall*, 99 U. S. 235; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 423.

In *Harris v. Youngstown Bridge Co.* (C. C. A.), 90 Fed. 322, 328, Judge Taft reviews the authorities and concludes by saying:

The mortgagee of after-acquired property is not a purchaser for value and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired. The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act of purchase or acquisition, and therefore necessarily qualify its scope and extent.



Where the legal title to property has been obtained through fraud, a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder, until the rights of a purchaser for value intervene. *Moore v. Crawford*, 130 U. S. 122, 128; *Pomeroy Eq. Jur.* (3d ed.), sec. 1053; *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311.

## X.

### SUBSEQUENT DEVELOPMENT IN THE ELK HILLS.

Belief that the land was valuable for oil at the time of the proceedings which culminated in the patent is an essential element of the charge that the nonmineral affidavits were false. Of necessity the conditions adequate to engender such belief were those existing at that time. If the affidavits were not false then they could not become so by any subsequent change in the conditions. *Diamond Coal case*, 233 U. S. 236, 240.

Adhering to this established rule the Government refrained from any attempt to show discoveries of oil in the Elk Hills subsequent to the patent. But the defendants, claiming that the converse of this rule was not binding on them, undertook to show the original good faith of the selection by testimony of the result of subsequent operations. The effort of the defendants was to show that the lands have since been demonstrated not to be valuable for oil, and

thus to prove that the opinions of expert geologists and practical oil men (including those of the Railroad Company), based upon known conditions prior to the patent, were wrong, and that the belief of the railroad officials at that time that the land was valuable for oil was a mistaken belief. If successful, the defendants claim the right to keep the lands, thus procured by means of false affidavits as to belief of nonmineral character, because they would have been entitled to the lands if the false affidavits had not been made and if their actual character had been then as now demonstrated. This is but the assertion of a right to retain that which has been obtained from the Government by deceit and perjury because it might have been obtained honestly if the railroad officials had chosen to testify the truth and risk an adverse finding. In this the defendants overlook the point that the land officers of the Government, within whose exclusive jurisdiction lies the power to determine the question thus presented to the court, have never had an opportunity to determine it. It was not presented to them and they were prevented from considering it by the dishonest and perjured acts of the Company.

But the defendants were not successful in their effort to prove by subsequent development that the known conditions prior to the patent were not a sufficient basis for belief of oil character. The very beginning of oil development in the Elk Hills soon after the patent under the same conditions

that existed before proves the contrary. More especially is this true because the principal operations shown were those of the Associated Oil Company, a creature of the Railroad Company. Moreover, the result of the operations could not help the defendants upon any theory unless they amounted to a demonstration that the land was not valuable for oil, for only in that event could it be said that the geologists and oil men and railroad officials were mistaken in believing the land to be valuable for oil. In fact, however, the testimony demonstrated the contrary.

It will be seen that while some of the wells drilled in the Elk Hills, beginning in 1910, were unsuccessful because of improper location, insufficient depth, and other causes, yet the evidence demonstrates that several successful, productive oil wells were drilled in 1910, 1911 and 1912 by the Associated Oil Company on the even numbered sections adjoining those in suit.

At that time the Associated Oil Company was a subsidiary of the Southern Pacific and absolutely under its control, W. F. Herrin, the General Counsel then and now of the Southern Pacific, being chairman of the board of directors. R. VI-3593-3603.

*(a) Successful Wells of the Associated Oil Company.*

The evidence shows that whenever wells were favorably located with reference to the well known anticline in the Elk Hills and were properly drilled,

oil was struck in large quantities coming from sands of the greatest thickness in the Kern County Oil fields.

The three successful wells drilled by the Associated Oil Company were on sections 24 and 26 of 30-23 and section 30 of 30-24. The Company spent about \$170,000.00 on these three wells and spent in development work in the Elk Hills in all about \$500,000.00.

At the time the Southern Pacific, through its subsidiary made these expenditures, in 1910 to 1912, the known conditions as to the Elk Hills were the same as they were in 1904 when it obtained its patent for the lands in suit. When W. F. Herrin, General Counsel and E. T. Dumble, Consulting Geologist of the railroad, as members of the Board of Directors of the Oil Company, authorized the expenditure of this money for the development of the lands interspersed with those in suit, they had no greater knowledge as to the geological conditions or the probabilities of obtaining oil than that possessed by the railroad geologists and officials in 1904. The conditions in 1910 were plainly such as to engender the belief that the Elk Hills contained oil of such quality and quantity that it could be extracted profitably and to justify expenditures to that end. And Herrin and Dumble, representing the Railroad Company's stock which controlled the Oil Company, voted to expend more than one-half million dollars because they believed the lands could be mined profitably and the results justified their belief. It

may be claimed that the drilling of a successful well in the Buena Vista Hills by the Honolulu Oil Company caused the Associated Oil Company to begin drilling in the Elk Hills. However, F. M. Anderson, their geologist, testified that there was no connection between the Buena Vista Hills and the Elk Hills and that the formations are in no way correlated. R. IV-2451-3. The successful Honolulu well is on section 10 of 32-24, nine miles from the nearest lands in controversy, while in 1904 there were many successful wells in the McKittrick District, only three or four miles from the lands in controversy.

The Associated Oil Company began its development work on sections 24 and 26 of 30-23 and 30 of 30-24, under leases from persons who made their locations for oil on January 1, 1910, agreeing to pay \$500.00 per acre if purchased in one year and \$750.00 per acre if purchased in two years from the date of the lease. After the Oil Company erected derricks, they ascertained there were prior locators claiming to have made discoveries of Fuller's earth on the properties (R. VI-3622) and the General Manager reported to the Executive Committee of the Board of Directors, W. F. Herrin, President, in the chair, on December 20, 1910, that he had entered into a supplemental agreement with the lessors reducing the purchase price and that he—

had a verbal understanding with the prior locators to receive three forty-acre pieces of each quarter section for drilling a well on

each quarter and also lease on the remaining forty in each quarter with option to purchase the same at One Thousand Dollars per acre. R. VI-3623.

On March 20, 1911, the General Manager reported to the Executive Committee:

In examining into the titles to our Elk Hills property, the present development of which indicates it to be oil producing land, I find that the mineral filings on which we base our title to this property were made subsequent to September 27, 1909.

Mineral filings were made on these lands prior to September 27, 1909, and are now held by Messrs. McKittrick, Jastro, Tevis, et al of Bakersfield.

The claimants under these mineral filings have asked for a patent on Section 24, 30-23 and Section 30, 30-24 by reason of their discovery of Fuller's earth. R. VI-3624.

I recommend the acquisition of these conflicting titles for the reason that they were made prior to September 27, 1909, and the work we have done, if applied against these filings would insure the issuance of a patent to us, providing we discover oil on each quarter section, which I think probable. In fact, we have made sufficient discovery on section 26 to enable us to obtain a patent at this time had the filings owned by us been made prior to the date of withdrawal.

Mr. Scribner had some negotiations with Mr. Jastro looking to the acquisition of these filings made prior to September 27, 1909, and

had agreed upon terms at which we would acquire the same. They afterwards withdrew negotiations. R. VI-3625.

An effort to buy out the prior locators was made but was unsuccessful and the parties under whom the Associated claimed filed a protest in the Land Office at Visalia against the application for a patent based on alleged discovery of Fuller's earth. This is the contest referred to by Capt. W. H. McKittrick and in which L. J. King, Superintendent, and W. A. Williams, geologist of the Associated, testified on behalf of the protestants that there was no commercial fuller's earth in the lands—that they were valuable oil lands and that the Associated had drilled successful wells. These witnesses also testified that other wells which had been drilled in the Elk Hills were unsuccessful because they were not properly located and from errors in drilling and other causes. Exhibits 9-C, 9-E, 9-M, and 9-O.

The Associated Oil Company proceeded with its drilling and on August 29, 1911, the general manager reported that he had issued instructions to proceed with the drilling of wells in 24 of 30-23 and 30 of 30-24; as to the well on 26 of 30-23, to discontinue work as soon as the field department completed perforating it and testing it to see the result obtained. R. VI-3633. He reported that he had ordered work stopped on the well on section 5 of 31-24 and section 22 of 30-23.



In the General Manager's report of September 19, 1911, he said "in reference to the producing well on section 26, Elk Hills, which well is now producing forty-five barrels of oil per day" that he recommended the company should make demand upon the locators under whom it claimed to apply for patent, and his recommendation was adopted. The report discussed the effect of the Pickett Bill, which was passed June 25, 1910, 36 Stat. 847, and in his report of November 28, 1911, the General Manager stated "In view of the uncertainty as to the status of our right to obtain patents to any of these lands, even if discovery is made, I recommend that we discontinue work entirely on these lands with the exception of the pumping of well on Section 26 and the deepening of well on Section 30" (R. VI-3639), which recommendation was adopted. At the meeting of the Executive Committee of the Board, held June 25, 1912, Mr. Wm. Sproule, President of the Southern Pacific, presiding, the following resolution was unanimously adopted:

Resolved that the General Manager be and he is hereby authorized and directed to instruct the Field Department not to make any further expenditures until otherwise ordered by this committee on any lands in Elk Hills except on the lands in sections 24, 26 and 30, on which wells have been brought in, and to limit the expenditures on said lands to such as may be necessary in the operation of said wells. R. VI-3645.



These official records show that three wells had been "brought in" by this Oil Company, owned by and operated through the officials of the Southern Pacific; that a "producing well" had been developed and that "sufficient discovery had been made to enable us to obtain patent" and that the directors passed a resolution requesting the locators under whom the Oil Company claimed to immediately make application for patent under the provision in their lease that "upon completion of any well in which oil has been developed, lessors shall make application for patent for land upon which the well is located." R. VI-3636.

If the Associated Oil Company had developed the wells on the odd numbered sections in 30-23 involved in this suit, instead of on sections 24 and 26, and had filed a protest against the Railroad Company's application for these lands as agricultural lands, there can be no doubt that the Associated Oil Company would have prevailed in the contest and have secured patents for the land as mineral land.

In a suit by the Government against a land grant railroad to annul a patent fraudulently covering mineral lands, excluded from the granting act, the Government is not in a less favorable position than a claimant who alleges that the land is mineral.

Though the development work by the Associated Oil Company brought in producing wells and entitled it to patents for said lands as mineral lands, yet it is contended that this development work established

the nonmineral character of the lands upon which these wells were drilled and also fixed a similar status to the adjoining lands in suit. Enough has been shown from the records alone of the Executive Committee of the Associated Oil Company to show that defendants' contention is wholly without merit.

While admitting that the three wells on sections 24, 26 and 30 developed oil, the defendants contend that oil was not produced in paying quantities.

*P. G. Williams*, the auditor of the Associated Oil Company, testified that he prepared from the regular reports or letters sent in by the superintendent in charge, a tabulation of the production of the three deep wells. The production charts were offered in evidence by defendants. R. V-3125.

*W. E. White*, chief clerk of A. F. L. Bell, the chief engineer of the Associated Oil Company, testified that he prepared graphic logs showing the history of the drilling and production of the three deep wells and that he made these logs from the original drilling reports. These logs were offered in evidence by defendants and constitute exhibits 172-3-4. They would not introduce the original drilling reports.

The Government objected to the introduction of the graphic logs unless the original drilling reports from which the witness stated he made them were introduced, counsel for defendants stating that he had them in court. The Government introduced and read into the record these drilling reports (R. V-3196,

3159) and they cover pages 43 to 562 of the volume of "Documents and Evidence Not Printed."

The logs purport to be a condensation of the daily drilling reports, but an examination of these original reports shows that the logs are full of inaccuracies, mistakes, omissions and other errors, many of which the witness White admitted in his cross examination, beginning at page 3191 of Volume 5, and covering more than a hundred pages. As will appear later herein, the logs greatly reduce the production of the wells as shown by the daily reports. This doubtless accounts for the non-introduction by the defendants of these reports and their introduction by the Government.

As these daily drilling reports cover more than 500 pages of the typewritten transcript, it is impracticable in this brief to refer but briefly to them and then to the reports for only a few months of one of the wells, but the differences between the reports and defendants' logs for these months will suffice to show that the logs are thoroughly unreliable.

#### **The well on 24 of 30-23.**

The production of the well on section 24 of 30-23 according to the defendants' charts and logs was 2965 barrels for the month of June, 1912 (R. V-3126), whereas the production as shown by the daily reports from which defendants' witnesses professed to have made their charts and logs was 5160 barrels (pages 555 to 565 of volume of "Documents and

Evidence Not Printed") and the well was shut down for five days during that month.

The graphic logs made by White and the production charts made by Williams showed the same total production for each well and in an effort to explain the great discrepancies between the totals as shown by the drilling reports and the totals made up by these employees, they claimed the reports were only estimates—but this is not the fact but they are the daily record of the production as sent in by the superintendent, King. The difference may be accounted for by the statement made by White that "the total which I have here is *the amount of oil sold.*" R. V-3232. In other words, their total production does not in fact represent the total oil produced but the total oil sold.

The report for June 12th says: "At present time, is making 800 to 900 barrels," and the report dated June 17th says: "making good clean oil, produced at lowest figure 750 barrels of oil yesterday. Without doubt will increase in flow."

The defendants' production chart for May, 1912, for this well shows 240 barrels—but defendants do not call attention to the fact that during this month they were continuously at work on the well and the casing was not perforated until the last of May and the well was not ready for the pump until June (pages 553-4-5 of "Documents and Evidence Not Printed") when, as we have seen, some days it produced from 750 to 900 barrels. The fact that it did not produce before completion is of no importance.

For July the defendants credit the well with 247 barrels. The drilling reports show that from the first to the eleventh the well was shut down, while they were at work on it, and on the 12th it was "placed on the pump at 2,500 feet, flowing about 350 barrels per day through tubing."

On 14th "made about 360 barrels." On 15th "pulled pump. Same sanded up to 2,500 feet," yet flowed 75 barrels. On 16th, 17th, 18th, sanded up, continued to flow 75 barrels per day. On 19th, it flowed 100 barrels and on 20th, 75 barrels though still filled up with sand to 2,500 feet. On 21st "filled it with oil to clean it out and the process of cleaning it out continued throughout the rest of July. Pages 557-8-9 of "Documents and Evidence Not Printed."

So this well was in trouble throughout the month of July and yet the drilling reports show that for the seven days from the 14th to 20th it flowed 830 barrels, whereas the defendants have placed its production for the entire month at 247 and it was upon this basis that Anderson estimated that the well would not pay for itself in ten years. Exhibit 26.

Let us now examine the drilling reports of this well for August, the last of the four months used by Anderson in Exhibit 26. The well is credited by defendants for that month with 150 barrels. R. V-3126. During the first seven days the drilling reports show the well was being cleaned out, yet it flowed 50 barrels on the 3d, and one hundred barrels each on the 4th and 5th. On the 8th the driller lost

the drilling bit, and for the next ten days, while fishing for the bit weighing 250 pounds (R. V-3278) jammed in the casing with less than  $\frac{1}{4}$  inch space through which the oil could flow, the well continued to flow 100 barrels of oil per day until it was closed down under the general order from the Company, with the drill bit still in the well. Pages 559, 560 "Documents and Evidence Not Printed."

The defendants credit this well for August with 150 barrels, while their own reports show they were cleaning it out the first seven days of the month and lost the bit on the eighth and were unsuccessfully fishing for this until they began to cap and close the well on the 19th and that they finished capping it and shut it down with all the other wells on the 23d, still the well flowed, under these adverse circumstances, 1200 barrels in 12 days and in the Superintendent's report for August 10th, he says the 100 barrels per day was "actual measurement in tank."

The drilling reports show that on August 11th, 12th, 13th and 14th this well, while they were fishing for the drilling bit, was not only flowing 100 barrels of oil per day, but was also flowing 3,000,000 cubic feet of gas per day.

The logs and charts offered by the defendants as to the wells on 26 of 30-23 and 30 of 30-24 are no more an accurate or true representation of these wells than are the logs and charts of the well on 24 of 30-23, many of which inaccuracies and misrep-

resentations have been pointed out. The limits of this brief prevent an extended reference to these.

**The well on 30 of 30-24.**

*J. W. Kingsbury*, mineral inspector and geologist, testified that on June 10, 1911, he met L. J. King, Superintendent, W. O. Maxwell and Mr. Barnes, representatives of the Associated Oil Company, at the well on 30 of 30-24.

I remember speaking to Mr. King and asking him for permission to look at the well, and at the same time he informed me that there had been a discovery of a great amount of oil on Section 30 of 30-24, in one of the Associated Oil Company's wells. I went with Mr. King and Mr. Maxwell onto Section 30 to look at the well and saw oil coming from the well, which I estimated at about 2,000 barrels in 24 hours. Mr. Maxwell said that he thought it was about 5,000 barrels per 24 hours. . . . On January 24th, 1912, I went out with Mr. McCabe, Head Driller of the Associated Oil Company, and I gauged the well on Section 30, 30-24, and according to my gauge it was producing 385 barrels per 24 hours and the gravity of the oil was 24.2 Baume. R. VI-3688-9.

*James F. McCay* testified that he was an oil driller and in charge of the well on 30 of 30-24 and that it started off at 50 barrels of oil per day and after it was put on the pump it gradually increased in volume and he gauged it and it was producing at the rate of 406 barrels per day. R. I-411.

**The well on 26 of 30-33.**

The evidence shows that the well on 26 was drilled to 3,548 feet, but caved and ruined, then was re-drilled from 2,837 to 4,030 feet and again ruined. Before it was re-drilled it came in as a gusher. The drilling reports and defendants' log show 159 feet of oil sand in this well and defendants' expert, F. M. Anderson, admitted that this thickness is more than twice as thick as the average thickness of oil sands in wells in the Midway, McKittrick and Sunset fields. R. IV-2629-2635.

Defendants' logs and charts not only grossly misrepresented the production of the three deep wells but the formations are misrepresented and the occurrence of sands and boulders concealed. Defendants' expert, F. M. Anderson, testified that the Elk Hills were too far removed from any ancient shore line to contain sands sufficient for a reservoir for oil in commercial quantities and that "boulders" were evidences of shore line conditions. The drilling reports specifically show that boulders were encountered on a number of days, but their occurrence was not noted on defendants' logs or charts. The presence of boulders would have destroyed Anderson's shore line theory, hence their suppression.

After the defendants had refused to offer the original daily reports in evidence and the Government had offered them and had established the incorrectness of the defendants' tabulations, it is passing



strange that the defendants failed to offer L. J. King, the superintendent who made the reports, to substantiate their contention that the reports were only estimates. The reports do not profess to be estimates and if King had been offered by them, he no doubt would have stated that the reports as sent in were correct. Besides, there was another reason why King was not examined by the defendants and this was because he had been a witness in the contest at Visalia in which the Associated Oil Company, was contesting, through its lessors, the application for a patent on the ground of a discovery of Fuller's earth of the prior locators of the sections on which these producing wells were located, the Associated Oil Company contending that the wells had established the valuable oil character of the lands. It is also significant that the defendants did not produce W. A. Williams, the chief geologist of the Associated Oil Company, who, W. E. White admitted, made up the logs which were introduced by defendants. R. V-3325. Williams was also a witness in the Visalia contest in which the railroad through its subsidiary oil company was attempting to establish the valuable oil character of these lands with a view of securing a mineral patent, and it could not consistently use the same witnesses in its effort in this case to show their non-mineral character.

*(b) Unsuccessful wells.*

There were a number of wells which were drilled in the Elk Hills in 1910 and 1912 which were not productive but in nearly every one of them there was a showing of gas and oil. The evidence establishes the fact that they were not successful either because they were not properly located with reference to the axis of the anticline or they were drilled to an insufficient depth, the depth varying from a few hundred feet to approximately four thousand feet, the depth of the three successful wells of the Associated Oil Company. Space will not permit a detailed reference to the voluminous testimony covering these wells.

The defendants' chief expert, Anderson, admitted that the wells in the Elk Hills which were drilled by the Associated Oil Company, and discovered oil, are reasonably near the axis of the anticline and are on lands contiguous, adjoining and interspersed with the lands in suit and that many of the wells which he observed on the fringe of the hills and which were not in operation in 1912 "are remote from the axis of the anticline and all of them are in very unfavorable position, even those on the anticline." R. IV-2640-2.

The defendants in their brief upon the facts in the Circuit Court of Appeals refer specifically to four of the unsuccessful wells, to-wit: Redland Oil Company well on 30 of 30-23, the Hill Crest on 28 of 30-23, The Midway Pacific on 32 of 30-23 and the Scottish Oil Fields on 20 of 30-23.

In the Redland well, John Lang, defendants' witness, testified that gas was found at 520 feet and a

color of oil at 1,050. R. III-1954. At 1,300 feet gas was discovered in sufficient quantity to ignite and set fire to the rig and burned it down. R. III-1956. He further testified that the well went down 2,850 feet and that wasn't deep enough to prove anything definitely about that being oil territory; that oil might be gotten in paying quantities from 3,500 to 4,000 feet. R. III-1963.

As to the Hill Crest well, Lang testified they went down to 1,670 feet and that was not deep enough to test the territory. R. III-1962. He also testified this company hasn't abandoned the property, but keep a watchman there and hope to develop the property as soon as the necessary funds are secured. R. III-1960.

As to the Midway Pacific well, Lang testified it was drilled to a depth of 2,425 feet and that this was not deep enough to test it. R. III-1963. A trace of oil and gas was encountered at 1,535 feet. R. IV-2314.

As to the Scottish Oil Fields well, T. M. Storke, defendants' witness, and one of the organizers of the Company, admitted that the well was not located upon the advice of a geologist. At 850 feet some gas was struck and at 1,400 feet a heavy flow of gas and at 2,600 feet considerable gas and after that gas would break through every now and then. R. III-2044.

Our well was started in November, 1910, subsequent to the withdrawal order of 1909 and 1910 so if we had discovered oil in com-

mercial and paying quantities before we pulled our tools from the well we were uncertain as to the validity of any title we might acquire from the Government. R. III-2045.

John Lang further testified:

The fact that the Government of the United States has withdrawn from entry the land in the Elk Hills has to some extent had something to do with our not doing anything further with our locations as it makes it doubtful whether or not we can get title to the land. The withdrawal, I think, has also had a tendency to discourage capital and has discouraged locators because of their inability to get capital interested. R. III-1955.

Instead of the development in the Elk Hills tending to establish the non-mineral character of the lands in suit, we submit that it has the contrary effect. Dr. Branner testified that it confirmed his previous belief in its valuable oil character (R. II-1003) and others testified to the same effect.

During the trial defendants called for the production of the reports made to the Government by Robert Anderson. President Taft on September 2, 1912, withdrew the lands in suit, together with other lands in the Elk Hills for the use of the Navy and established Petroleum Naval Reserve No. 1. This withdrawal order was based largely upon the geological investigations made by Robert Anderson. His reports, upon demand, were produced by the government but after inspecting them, the defendants did not offer them and they were thereupon

offered in evidence by the Government. In a report made in August, 1912, Anderson stated that he believed in most cases where the wells had not been proven successful that the tests were not adequate and called attention to the three successful wells of the Associated Oil Company. Ex. 5-T. After a visit to the Elk Hills he reported in November, 1912, that in his opinion the reserved area would yield 100,000,000 barrels of oil as a conservative estimate. His original estimate was 250,000,000. He made reference in this report to the development which had taken place in the Elk Hills and he concluded that the southwest fringe of the hills, where the unsuccessful wells had been drilled, would not be as productive as the summit where the lands in controversy are situated and that the only three wells drilled to an adequate depth in the central part of the hills were the Associated Oil Company's wells and that these struck zones in which the oil was under pressure and spouted, the one on section 24 having come in at the rate of 1,000 barrels per day and the other on section 30 having produced from 150 to 300 barrels per day and both sanded up after some days. Ex. 5-V.

The Associated Oil Company has not abandoned its wells in the Elk Hills. M. H. Whittier, defendants' witness and a director of the Oil Company, testified that the Oil Company had not abandoned any of its property in the Elk Hills. R. III-1987. This also clearly appears from the testimony of J. W. Kingsbury. R. VI-3692-6.

### CONCLUSION.

We submit that the "known conditions" and other circumstances as established by the evidence in this case are remarkably similar to those in the *Diamond Coal* case, 233 U. S. 236, 241-248. In that case the Court said the evidence established the following facts:

(1) The patents were all secured by means of affidavits and proofs, . . . declaring that the lands were essentially non-mineral, were not known to contain any deposit of coal and were sought for agricultural purposes, and not for mineral land.

The patent here was secured by similar proofs.

(2) For many years the district in which the lands were situate had been known to contain coal. They were surveyed in 1874, and the surveyor reported one of the sections as coal land, the others being contiguous to land similarly reported. This was shown in the field notes and upon the official plats.

The evidence here shows that the lands in suit were in a well recognized oil district and surrounded by surface indications of oil and withdrawn from entry because of their probable oil character and the survey of 1901 reported them as mineral (oil) lands and this was shown in the field notes and upon the official plat.

(3) Along the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and

in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places and the openings disclosed a coal bed, from 6 to 14 feet in thickness dipping to the west at an angle of from 15 to 25 degrees from the horizontal, as did the cretaceous rocks with which it was interstratified. This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal bearing strata of that region.

The outcrop of oil bearing strata was exposed on the eastern flank of the Temblor Range and its commercial value for oil was demonstrated by more than two hundred producing wells drilled prior to patent, extending for thirty miles from McKittrick to Sunset. This outcrop was west of and within a few miles of the lands in suit and dipped towards them.

(4) There was nothing upon their surface showing the presence of coal beneath, nor anything indicating that the bed outcropping on the east and dipping to the west did not pass through them.

In our case there were upon the surface of the lands in suit and upon those in the vicinity, oil sands, seepages and other indications of oil and there was nothing indicating that the outcropping did not pass through the lands in suit, but the evidence of Dr. Branner, Veatch and the reports and maps of Owen and other evidence clearly show that there was every reason to believe the outcrop did pass through

the lands in suit, and it is conceded that the anticlinal structure of the lands is ideal for the accumulation and retention of oil.

(5) Unless valuable for coal, they were not worth to exceed a dollar and a quarter an acre. They were arid sage brush lands, about 7,000 feet above sea level, and afforded very limited pasturage. Without irrigation they were not susceptible of cultivation, and the cost of securing water for that purpose was prohibitive.

The evidence shows that the lands now sued for are of like character.

(6) The expert for the Government (Veatch) having in mind the known geological conditions—

gave it as his opinion that the coal bed extended into and through the lands in question and that practical coal men would regard the lands as valuable for coal and invest in them as such. He accordingly pronounced them coal lands within his acceptance of that term. This conclusion had substantial support not only in the facts already recited, but also in the fact that the Company's maps, made three years before the suit was begun, showed that it was intended to project its mining operations westward from the outcrop a mile and a half and had designated the intervening lands, which included some of those in controversy, as coal lands.

Likewise in the case at bar the same expert and also Dr. Branner, upon similar geological conditions,



gave it as their opinion that practical oil men would regard the lands as valuable for oil and invest in them as such. This conclusion likewise had substantial support in the fact that the Company's maps and reports, made by its experts two years before patent, showed that it was intended to extend its oil operations eastward from the outcrop beyond the lands in suit and had designated lands interspersed with the lands in suit as oil lands, had segregated them from its agricultural lands, and was going to develop them for oil through its subsidiary, the Kern Trading and Oil Company.

(7) In short, the company, without care as to the means, sought and acquired the lands because it regarded them as valuable for coal. Its view and purpose were also reflected by its maps and tax returns.

Here the Company's purpose to acquire the lands without care as to the means is reflected in its maps and lease and in the secret file of Eberlein's correspondence.

On account of the known conditions, the belief was generally entertained in 1903 and 1904 that the lands in suit were valuable oil lands. This belief was entertained not alone by the experienced and practical oil men of that region, but also by the geologists and responsible officials of the Railroad Company, evidenced by their acts and deeds, and by the documents and correspondence which furnished plenary evidence of belief in the oil character of the lands and their

purpose to deceive the officers of the Land Department.

In view of the evidence establishing the similarities in the essential facts constituting the known condition in the two cases and in other respects and the close analogy between coal and oil in their mode of deposition and situation in the earth as shown by the evidence, we submit that the rule laid down in the *Diamond Coal* case applies to the facts of this case and tested by that rule, the known conditions at the time of the proceedings which resulted in the patent, were plainly such as to engender the belief that the lands contained oil deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end and that the lands were and are known mineral lands excepted from the grant to the Railroad Company and that the patent was procured by the false and fraudulent representations of the Railroad Company.

It is respectfully submitted that the decree should be reversed.

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